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AMERICAN STATE TRIALS

*A Collection of the Important and Interest-
ing Criminal Trials which have taken place
in the United States, from the beginning
of our Government to the Present Day.*

WITH NOTES AND ANNOTATIONS

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VOLUME XVI

ST. LOUIS
THOMAS LAW BOOK CO.

1928

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TO
THE HONORABLE
SELDEN PALMER SPENCER
(1862-1925)

Of St. Louis, Missouri

JURIST AND STATESMAN

This volume is dedicated in memory of a devoted friendship

PREFACE TO VOLUME SIXTEEN.

To this volume of American State Trials the editor has chosen to give the name, "The Book of Great Speeches." Replete with the eloquence, the skill and the tremendous force of such advocates as Alexander Hamilton, William H. Seward, Rufus Choate and Robert G. Ingersoll, it abundantly justifies the choice.

No more splendid collection of oratory may be had in any state or nation than the addresses of counsel in its most celebrated trials.

While it is often said that the day of the great orator at the bar is past, he has, without doubt, played a great part in the development of our institutions. His efforts are more than mere speeches, they are documents of intense human interest and form an invaluable source of material for an historical study of the development of American life from the colonial days to the present time.

The eloquence of an advocate before a jury to be effective, need not be used to becloud the facts, direct attention from the real issues, and produce a conscious miscarriage of justice, the doing of which by the modern shyster has gone so far to bring the legal profession into ill repute and at times to breed a disrespect in the popular mind for law and the courts. It has had, and still has, a real function, when not abused, to sum up, to simplify, to elucidate the facts and issues as placed before a jury in a long drawn out trial; to honestly assist the "twelve good men and true" to properly perform that task

than which none can be nobler—giving every man his due. In every great trial, no matter how carefully the public has followed the testimony, an intense interest is manifested in how the case will be summed up and presented by opposing counsel in their addresses to the jury. In this way may be used as effectively as ever real oratory, which has been well defined as the ability “to make the auditor think and feel as the speaker thinks and feels.”

Many are the famous speeches by which have been saved a poor, unfortunate but unjustly accused human being from death upon the gallows, or a living death behind prison bars; and many are those by which fundamental principles of right and justice, or the cause of human liberty have been made more vital forces in the life of a people.

So it is that the forensic eloquence of great advocates have held their auditors in rapt silence and through wide publication have influenced profoundly the life of a great nation. So it is that a fundamental legal principle may have its birth in the mind and heart of a great lawyer, and be first given expression in his appeal to a jury, which latter body may be persuaded to render a verdict directly contrary to instructions from the Court telling them the law by which they are to be guided. At times such persuasive oratory may result in a miscarriage of justice, at other times it may serve the worthy purpose of assisting to displace an existing rule of law by a greater and more enduring principle of justice.

Such are the masterpieces of eloquence and oratory recorded in this volume.

Seldom is a single trial fraught with greater significance at once for those who are interested in the historical development of legal principles, for students of American Colonial History, for those engaged in tracing the rise of political institutions in the new world, and for all true friends of the greater principles of human liberty than that of *John Peter Zenger* (p. 1) for criminal libel in New York City in 1735.

It was not so much the issue to be tried or the character of the parties involved, but the daring argument of the defendant's counsel that marks this as one of the great trials in American History.

Acts of oppression and high handed tyranny by Governor Cosby and his party had created a smouldering fire of indignation throughout the colony. It remained for the humble printer, Zenger, in his *Weekly Journal*, to hasten the growing animosities to a climax.

A single newspaper was at this time published in New York by William Bradford, and was largely at the beck and call of the representatives of the crown. The leaders of the popular opposition induced and assisted a poor German printer, John Peter Zenger, to establish, in 1733, the *New York Weekly Journal* as an instrument of defense of the rights of the people. Criticisms of the Governor and his party of considerable severity appeared in the new paper and instantly attracted wide attention.

Repeated efforts were made to secure an indictment against Zenger at the hands of the grand jury, but that body was not to be induced to strike a blow at the people's cause. Finally an information was filed by the attorney-general charging him with printing and publishing certain false, scandalous and

sedition libels in his paper. The statements printed by Zenger were largely generalities and not such as could be seized upon as the basis of a prosecution at this day of freedom in discussion of political and governmental questions, and the acts of public officials.

The law of seditious libel was at that time, however, rigid and harsh. The truth of the alleged statements and the absence of malice would not relieve or mitigate the punishment.

Charged with criminal libel of Governor Cosby and the government, Zenger was left without counsel by the Court's disbarment of those lawyers who had undertaken his defense.²

One of the earliest official acts of Governor Cosby was the arbitrary removal of Chief Justice Morris of the Supreme Court who dared to deny authority for his highhanded procedure. James De Lancey was appointed to the place. James Alexander and William Smith, counsel for Zenger, and leaders of the popular party, as the first step in the defense of their client, filed exceptions to the judges' commissions because the appointments were to continue during the pleasure of the King rather than during good behavior, and because made alone by the governor rather than with the advice and consent of the council. For the filing of these exceptions they were disbarred by the court.³

Andrew Hamilton⁴ of Philadelphia, the most noted

² On request of Zenger for counsel the Court appointed one John Chambers to defend him.

³ Besides the loss of counsel it was with some difficulty that the friends of Zenger were able to prevent the selection of a packed jury in favor of the governor.

⁴ Andrew Hamilton came to America as a young man near the

advocate in America, though supposedly in his eightieth year and greatly indisposed, made the journey to New York without fee to act as counsel.⁵ It was the speech of this grand old man that makes the Zenger trial one of great significance.

The part of the defense began with a frank admission of the facts,—that the accused had written and published the statements in question. Whether or not they were criminally libelous was the only issue, and this, ruled the Chief Justice, was a matter for the determination of the Court.

Criminal libel was defined in this case as “a malicious defamation, expressed either in writing or printing (signs or pictures), and tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and to expose him to public hatred, contempt or ridicule,” with the explanation that the chief cause for which the law so severely punishes all offenses of such nature, is the direct tendency to cause a breach of the peace, by provoking the parties injured, their friends and families to acts of revenge. As it had been suggested that the ill-advised publication of the truth concerning a person would be more likely to provoke him to a breach of the peace than would the publication of a falsehood which he could easily disprove, there arose the maxim,—“the greater the truth, the greater the libel.”

end of the seventeenth century. He settled probably in Virginia, lived for a time in Maryland, and later removed to Pennsylvania, being drawn thither by his law practice. He practiced extensively in several colonies and soon rose to the top of his profession. In 1712 he made a trip to England and was there honored by being made a member of Gray's Inn.

⁵ Friends of Zenger feared the domination of the trial by the Governor and sought the services of Hamilton.

Hamilton sought to prove the truth of the statements made, contending that they were justifiable if really true, and argued that this doctrine declaring that truth makes a worse libel than falsehood was monstrous and ridiculous, finding support in a case before Lord Chief Justice Holt in which the truth was allowed to be shown. Chief Justice DeLancey directed, however, in accord with the general law of criminal libel of that day, that the truth of an alleged libel could never be permitted in evidence, and quoting from a ruling in an earlier case said: "It is far from being a justification of a libel that the contents thereof are true, or that the person upon whom it is made had a bad reputation, since the greater the truth in any malicious invective, so much the more provoking it is."

Being denied the right to prove the truth of the alleged libel, an argument to the jury was all that remained. This was allowed, although the Court insisted, as was the law of that day, that whether the article was libelous was a question for the Court alone and not for the jury.

The contest there waged had in it more than the issue of guilt or innocence of the humble printer, it had as well the larger issue between the people of the province and their royal oppressors. People from every station in life were in attendance eager to support the champion of their liberties.

Hamilton's speech is a classic as a defense of the rights of the oppressed colonists to give expression to their suffering at the hands of an arrogant and incompetent royal governor, and stands as a splendid example of the courage of such men as he, so instrumental in the ultimate establishment of our free government, and the assurance of constitutionally

guaranteed freedom of speech and freedom of the press.

This was the most famous forensic effort of the foremost American advocate of his day, and won for him a place among the great lawyers of all time.* By his daring espousal of the doctrine of freedom of the press, as also of the broader principles of liberty and justice, it is said that he created such a profound impression that, as acclaimed by Gouverneur Morris, he has been called "the day star of the American Revolution."

Not only was the poor printer released by the jury in disregard of the directions of the Court and probably contrary to established law, but a basis for a change in the law of criminal libel was largely laid by means of this great speech, and the American Colonists were more deeply inspired with the cause of human liberty.

As a token of the public gratitude for this great work the City of New York, through its Common Council,⁷ "under a grateful sense of the remarkable service done to the inhabitants of this City and Colony by Andrew Hamilton, by his learned and generous defense of the rights of mankind and the liberty of the press, in the case of John Peter Zenger . . ." bestowed "the public thanks of the freemen of this corporation for that signal service, which he cheerfully undertook under great indisposition of

* Andrew Hamilton is one of the very few lawyers of the colonial period who established a reputation that has endured to the present day. William Draper Lewis in his work, "Great American Lawyers," gives place to Hamilton alone of those whose work ended before the American Government under the constitution was established.

⁷ A full report of the proceedings in honor of Hamilton is printed in Howell's "State Trials," vol. 17, p. 723.

body, and generously performed, refusing any fee or reward".⁸ In addition a gold box bearing the seal of the city and containing a certificate of the "Freedom of the Corporation" was presented by a representative of the city sent to Philadelphia for that purpose.

Commenting on Hamilton's argument, a writer in a London newspaper of the time said, "If it is not law it is better than law, it ought to be law and will always be law wherever justice prevails."

Judge Cadwalader of Pennsylvania said,⁹ referring to Hamilton's argument in the Zenger case: "Propositions in this argument, which were, strictly speaking, untenable as points of Anglo-American Colonial law, prevailed, nevertheless, at that day, with the jury. These propositions have since been engrafted permanently upon the political jurisprudence of this continent. If that speech to the jurors who acquitted Zenger had never been uttered, or had not been reported, the framers of the constitutions of the several States might not have been prepared for the adoption of provisions like that of the Seventh Section of the Declaration of Rights in Pennsylvania".¹⁰

⁸ It was said by Benjamin Franklin, writing in 1741 on the occasion of Hamilton's death, "He was long at the top of his profession here, and had he been as griping as he was knowing, he might have left a much greater fortune to his family than he has done. But he spent much more time in hearing and reconciling differences in private, to the loss of his fee, than he did in pleading cases at the bar."

⁹ *Pennsylvania Magazine*, vol. 16, 18, p. 45; vol. 1, Lewis' "Great American Lawyers."

¹⁰ The section in question guarantees freedom of the press in the discussion of public questions or in comment upon the acts of any branch of the government, or of public officers, and further provides that in all indictments for libels the jury shall have the right to determine the law and the facts under the direction of

The law of libel has undergone a fundamental change, both in England¹¹ and in this country, largely in accord with the argument of Hamilton in this since memorable trial.

The boldness, the power, and the sincerity, as well as the splendid eloquence of this magnificent address to the jury may be sensed from a single paragraph of the peroration,—

"Power may justly be compared to a great river; while kept within its due bounds, it is both beautiful and useful, but when it overflows its banks, it is then too impetuous to be stemmed; it bears down all before it, and brings destruction and desolation wherever it comes. If then this is the nature of power, let us at least do our duty, and like wise men (who value freedom) use our utmost care to support liberty, the only bulwark against lawless power, which in all ages, has sacrificed to its wild lust and boundless ambition, the blood of the best men that ever lived."

This argument of Andrew Hamilton, laying as it did the foundation stone of our much vaunted American liberty of the press, stands as a noble monument to the memory of a bold pioneer in the cause of human liberty.

While the argument of Andrew Hamilton in the Zenger trial did so much for the cause of liberty of the press, it was left for a more famous Hamilton to carry the fight more nearly to a complete victory some three score years later in a trial of another New York printer for criminal libel. The trial of *Harry Crosswell* (p. 40) was in many respects almost an exact counterpart of the Zenger case.

Crosswell, editor of *The Wasp*, was charged with having published in his paper a statement alleging

the Court as in other cases. Similar sections have been widely adopted into our State constitutions.

¹¹ Fox's Act in 1792 made the jury the judges both of law and fact in criminal libel prosecutions. Lord Campbell's Act of 1843 provides that the truth of the alleged libel may be given in evidence, though it may not always constitute a defense.

that Jefferson had paid one Callender for the publication of a certain libelous article. The defendant's counsel sought a continuance in order to obtain the testimony of Callender who, it was asserted, would testify to the truth of the charge that he had received money from President Jefferson to assist in the publication of the pamphlet in which the statement in question appeared.

The Court refused the continuance on the ground that the truth of an alleged statement can never be given in evidence in a prosecution for criminal libel. It was also ruled by the Court that the only function of the jury was to determine whether or not Crosswell published the matter in question, while the determination of whether the statements constituted a libel was a matter entirely for the Court.¹²

Such had been the rulings on the same questions in the Zenger trial, and as the elder Hamilton had done in that trial, so Alexander Hamilton¹³ argued most forcibly in the Crosswell trial¹⁴ that the truth should be allowed in evidence and that the ultimate question of libel or no libel was one for the jury.

It was argued by Hamilton and his associate, Van Ness, that the doctrine making a writing equally libelous whether true or false originated in the despotic tribunal of the Star Chamber¹⁵ which, by oppressive acts and without the aid of a jury, had departed from the course of the common law and

¹² The jury, under instructions from the Court leaving to them only the question of publication, found a verdict of guilty.

¹³ Alexander Hamilton, like Andrew Hamilton in the Zenger trial, appeared without fee.

¹⁴ On a motion for a new trial.

¹⁵ An argument likewise used by Andrew Hamilton in the Zenger trial.

introduced this change which it had no authority to do.

Hamilton accurately anticipated the law of criminal libel as later established when he argued that the truth should be allowed in evidence for its bearing upon the intent with which the alleged statement was published, that without evil intent it should not be considered a libel and that the existence of this intent, and thus whether libel or no libel, should be a matter for the determination of the jury.

“I contend,” said Hamilton, “for the liberty of publishing truth with good motives and for justifiable ends, even though it reflect on government, magistrates or private persons.”

It was forcibly insisted that the malicious intent was a controlling element in determining whether it was libel or no libel, and that the jury should be allowed to pass on the maliciousness of the intent as it determines the matter of intent in other criminal cases. “The criminality of an act,” argued Hamilton, “is matter of fact and law combined on which it cannot belong to the exclusive jurisdiction of the Court to decide.”

An extended and highly learned argument was presented by Hamilton in which he maintained that the common law had originally left the whole question of law and fact to the jury under a direction from the Court; that the precedents cited for the later practice of leaving to the jury only the question of writing and publication, leaving entirely to the Court to determine whether or not the matter constitutes libel, are all traceable to a decision of the Court of Star Chamber and had never been fully acquiesced in; that the Court must still be free to decide in

accord with the early common law and that justice and reason demanded such a result.

The Court, after hearing the argument of Hamilton, was evenly divided¹⁶ on the question of allowing the truth of the alleged libel in evidence and of allowing the jury to judge not only of the fact of publication but of the whole issue. Due to this even division of the judges the prosecution never moved for judgment upon the verdict.

The argument of Alexander Hamilton in this case was, perhaps, the most learned presentation of the contention both that the truth should be allowed in evidence in a prosecution for criminal libel, and that the jury should judge of the whole issue of law and fact, that the annals of English and American jurisprudence afford.

There is little doubt that the unanimous passage through both houses of the New York legislature early in 1805, bringing the law into practically complete harmony with Hamilton's argument, was a direct result of the profound impression made by him in the Crosswell trial.¹⁷

Other states have likewise liberalized their law of criminal libel by statutory enactment or by constitutional provisions.

Freedom of the press thus obtained the realization of which we are so justly proud; a result, the responsibility for which rests so largely upon the arguments of the two Hamiltons in these now historic trials.

The trial of *William P. Darnes* (p. 78) on a charge of manslaughter, resulting from a fatal injury in-

¹⁶ Thus the motion for a new trial was denied and the prosecution was entitled to move for judgment on the verdict.

¹⁷ Shortly after the passage of this statute the Court awarded Crosswell a new trial.

flicted by the accused in an attempt to chastise the publisher of a newspaper in which he claimed to have been libeled, was the occasion for intense local interest, a published report of which attracted widespread attention throughout the country.

The speech of Henry S. Geyer, chief counsel for the defense, is the outstanding feature of this unusual trial, and stands as a striking illustration of the power of an able advocate to influence and work upon the sympathies of a jury in an attempt to secure a verdict of acquittal in a criminal case. Mr. Geyer contended that there are some injuries for which the law affords no adequate redress, and that a newspaper libel is such an injury. He asserted that it is the duty of one thus libeled to redress his own wrong, that a newspaper libel justifies a battery. It was argued that taking the law into his own hands and chastising the publisher, even if in such act he unintentionally kill his victim, was in accord with the spirit of the western institutions of the time and the spirit of the people. "The common law," he asserted, "is here modified by the spirit of our institutions, and everything repugnant to it is a dead letter."

It was insisted by Mr. Geyer in a forceful, masterly and eloquent argument well calculated to dominate the jury (coming as it did from an outstanding and well recognized leader of the bar), that the real issue in the case was not so much the guilt or innocence of the accused, as whether "the people of this country are to be exposed to the arbitrary tyranny of the press—the defenseless victims of its relentless cruelty. Whether it is to be cherished and encouraged in its licentiousness, by denying to its victims all adequate redress, and punishing them as felons if they attempt to redress themselves, and by accident

or misfortune exceed the just measure of retribution."

The jury were told that they were to determine whether the injuries to honor and character by an unbridled press for which the law affords no remedy, may be redressed by the victim. Appeal was made repeatedly to a higher law than our common or statute law, claiming the existence of a paramount right to disregard the law and take it into one's own hands and redress a wrong by violence under circumstances such as in this case, with an admonition to the jury to disregard any instruction from the Court to the effect that the rules of the common law were controlling on this particular subject.

It was strongly urged that public sentiment required Darnes to inflict chastisement upon his assailant (though assailed only by means of a newspaper editorial known to have been written by another), that society demanded it, and had he failed to undertake to chastise Davis, he would have suffered disgrace forever after.

It was further urged that a verdict of acquittal would serve as an admonition to all profligate editors, and would improve the general character of the press, while a verdict of conviction would serve as a new license, an encouragement to new aggression.

An eloquent argument by the prosecution for the maintenance of law and order, and the administering of a check to such resorts to brute violence, only served to secure a verdict of guilty of manslaughter in the fourth degree with a fine of five hundred dollars, which meant largely a victory for the defense.

The introductory note to the Boston edition of Thomas S. Nelson's little book, "The Trial of William P. Darnes," well describes this unusual speech

uttered by Geyer when it states that "the closing argument for the defense, will, we think, be acknowledged, one of the most ingenious and effective apologies for *club law* ever spoken."

The murder of John G. Van Nest and three other members of his family has few parallels in the history of crime conceived and committed by a single offender. The trial of *William Freeman* (p. 323) for the murder, in view of the extraordinary character of the fourfold tragedy, the mental condition and unique characteristics of the accused, and the important questions of medical jurisprudence involved in the case (questions then new in the administration of criminal justice¹⁸) was one of the most interesting and remarkable that had yet occurred in this country.

Without counsel or the means of hiring such, and apparently unconcerned as to his fate and unconscious of his danger, in the face of a hostile community demanding his immediate execution, Freeman presented a sorry spectacle.

A trial in which the new and unpopular defense of insanity, sustained by the testimony of medical witnesses, had prevailed, had recently taken place in this community and was fresh in the minds of the people. Great was the public indignation toward the defense attorney in that case and threats of personal violence were openly and freely made should any one dare to set up such a defense in this case.

Rarely, if ever, has a man undertaken a task which he deemed a public duty in the face of greater popular abuse than was heaped upon that same attorney when he arose in court and volunteered to assume

¹⁸ Only three years had passed since the decision of *McNaughten's Case*.

the burden of defending Freeman. Former Governor William H. Seward was thoroughly convinced of the insanity of the prisoner and felt that unless some one offered his services to secure a fair trial a great injustice, to the everlasting shame of all concerned, would be speedily perpetrated. It was with this task in hand, and with a full knowledge of all the popular clamor against him as a result of the previous trial, and fully informed of the existing threats and abuse, that Seward entered a plea of insanity on behalf of Freeman.

Throughout a long sanity hearing and a longer trial of the main issue, while public opinion was demanding the blood of the murderer and complaining of the delay and expense of an unnecessary trial of one who had been spared too long already, Seward bore with apparent composure all the abuse and insults heaped upon him and discharged most faithfully the duty he had, without hope of remuneration, undertaken.

In striking contrast is this with many trials of recent years in which enormous sums of money have been used to employ counsel and expert witnesses to carry the defense of insanity to limits then undreamed of.

Seward did not stand alone in his efforts, but other able counsel were found who were likewise willing to risk their reputations that justice rather than revenge might prevail.

The speech of Seward to the jury can, without doubt, be classed among the most eloquent and sincere appeals, not to passion or prejudice, but for justice and deliberation, ever delivered before a court and jury. A single paragraph may well convey his earnestness of purpose,

"I am not the prisoner's lawyer. I am indeed a volunteer in his behalf, but society and mankind have the deepest interests at stake. I am the lawyer for society, for mankind, shocked beyond power of expression, at the scene I have witnessed here of trying a maniac as a malefactor."

Futile were the efforts to save the prisoner from a verdict of guilty and a sentence that he pay with his own life. His death while awaiting a new trial made possible a determination of the issue by other means.

Seven of the eight physicians conducting a *post-mortem* examination were thoroughly convinced of Freeman's insanity from a disease of the brain of long standing. Thus Seward's position, even in the eyes of his severest critics, was entirely vindicated and, so far from destroying his reputation as at first seemed probable, his service in this case cast additional lustre upon a name already prominent in political and legal circles of the state and nation.

A problem of no little difficulty, both for court and jury, arises in the trial of one for murder or manslaughter, when the victim of an assault has died after the lapse of considerable time and the supervention of some additional cause. Whether the injuries inflicted by the accused caused death or whether a later cause is responsible must be determined by the jury. To what extent the original injuries operating through the later causes may be responsible must be determined in like manner, in reliance largely upon the testimony of medical witnesses. What combinations of later causes with that of the original injuries may so operate as to relieve the accused of responsibility must be explained to the jury by the Court. Such were the problems presented by the trial of *Edward O. Coburn and Benjamin F. Dalton* (p. 520) for the manslaughter of William Sumner.

Growing out of a state of facts bordering on the

sensational, involving as it did the domestic happiness of a young married couple destroyed by the intrusion of an outsider, and played up in the popular mind by the newspapers of the day, a splendid opportunity for an appeal to passion and prejudice lay before the attorneys in this case. Few cases can be found, however, in which such tactics have been more conspicuous by their absence. The arguments of the attorneys were clear-cut, scholarly presentations, calculated to induce a calm consideration by the jury of all facts involved, in a common effort to obtain complete justice. The cause of both the state and the defense was presented clearly, concisely, forcibly—yet with more than ordinary caution against the creation of a possible bias in the minds of the jury.

The handling of this case stands in vivid contrast to the over-zealous efforts of the prosecution in the *Freeman* trial, the questionable tactics of the defense in the *Darnes* trial, and the all too common present day practice in some jurisdictions of appealing to an unwritten law to justify that for which no legal justification exists.

As a sequel to the trial of *Coburn* and *Dalton* for manslaughter came the trial of the case of *Benjamin F. Dalton* against *Helen M. Dalton* (p. 587) for divorce on the ground of adultery.

Richard H. Dana, Jr., who so ably and successfully conducted Dalton's defense to the charge of manslaughter, continued as his counsel in the divorce case, while Rufus Choate, a recognized leader of the American bar, acted as chief counsel for Mrs. Dalton. Rarely has a trial furnished greater opportunity for parading sensational evidence, much of which had been used by the press to arouse the morbid interest

and curiosity of the public, yet never, perhaps, did counsel use greater efforts to avoid producing or emphasizing unnecessarily evidence that would cast a shadow upon the character of the opposing party to a suit. With no appeal to bias or prejudice where there was much upon which it could easily have been based, and with tireless and exhaustive efforts to make a fair and accurate presentation by each attorney for his client, there is much in the conduct of this trial that commends itself to the emulation of the bar at the present time. Seldom has greater legal learning, tact, fairness and forensic eloquence been displayed by counsel on both sides than in the trial of this case. The address of Mr. Dana to the jury was worthy of the greatest lawyers of the time and against an opponent of less eloquence and legal talent would have carried conviction to the minds of the jury. It was the masterly efforts of Mr. Choate upon which the case finally turned, and which have been referred to by a biographer¹⁹ as representing the climax of his skill as an advocate and among his most impressive utterances.

This case was of more than ordinary interest aside from its spectacular features and the eminence of counsel involved. It was the first instance in which a suit for divorce had been tried in Massachusetts by a jury. This was required by a statute only recently passed and was regarded as an experiment; one which has never gained wide acceptance.

The trial of *Charles B. Reynolds* (p. 795) for blasphemy is a fitting close for this volume, opening as it does with the famous *Zenger* and *Crosswell* trials

¹⁹ Joseph H. Choate, Jr., Volume 3, p. 538, William Draper Lewis' "Great American Lawyers."

for criminal libel. As freedom of speech, freedom of the press, and civil and political liberty were at stake in these trials, so freedom of speech and of the press as applied to religious liberty were in issue in the one now under consideration.

A trial on a charge of blasphemy, so little resorted to in recent years, was of very uncommon occurrence in this country at the time this case arose, and even in the New England States, the stronghold of Puritanism and thought of as less tolerant than their southern and western neighbors, more than half a century had passed since a person had been brought to trial on a similar charge. Never before had the law, copied from the English statutes of centuries before and brought down from the colonial period, been applied in New Jersey until it was made the basis of the prosecution in this case.

Because of the larger issues of religious liberty and freedom of thought and expression, and by virtue of the masterful oratorical efforts of Robert G. Ingersoll as counsel for Reynolds, the case attracted wide attention throughout the country. Not only was Mr. Ingersoll's great ability as an advocate displayed in this trial, but, involving as it did the very principles of intellectual liberty and freedom of conscience, for the attainment of which he spent the greatest efforts of his life, it was a fitting occasion for one of those matchless utterances for which he was then and later so famous. The sincerity and genuineness of his appeal, coming as it did from the very depths of his soul, combined with the splendor of his oratory have been infrequently surpassed or equalled in any court.

Mr. Ingersoll reviewed the rise of all of the leading religious faiths of medieval and modern times and

pictured the persecution through which their adherents had gone because they had dared to believe and speak their new tenets—persecution at the hands of those who, a few years before, had likewise broken away from an established church and had suffered similar persecution for their beliefs and teachings. He declared that punishment of the defendant in this case under the statute in question would be the same type of persecution as that visited upon the ancestors of every man upon the jury for stating his religious beliefs at a time when his faith or creed, whatever it may have been, was not that of the controlling majority.

Though he asserted that the statute was unconstitutional, a relic of an age in which men believed it was right to burn heretics and tie Quakers at the end of a cart and lash their naked bodies from town to town, that it violated both the letter and the spirit of the constitution which provided for religious liberty and freedom of speech and of the press, his words apparently fell upon deaf ears and his client was not permitted to escape without a fine.

No doubt the greatest efforts of any human being would likewise have been unsuccessful in an attempt to secure an acquittal by the jury in this case. Yet, as in the *Zenger* and *Crosswell* trials, a splendid and dramatic appeal in behalf of the greater principles of human liberty was not without its effect on the world at large.

ROBERT L. HOWARD.

School of Law, University of Missouri.
February 28, 1928.

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THE TRIAL OF JOHN PETER ZENGER, FOR LIBEL, NEW YORK CITY, 1735.

THE NARRATIVE.

William Cosby,¹ Colonial Governor of New York, in 1732, by his illegal and arbitrary acts became most unpopular with the people, especially as the House of Assembly took his side and the Council offered little or no resistance to his arbitrary measures. But the Courts were not so docile, and so Morris,² the Chief Justice who declined to obey an illegal order was removed and James de Lancey appointed in his place.³ A

¹ COSBY, WILLIAM, was the tenth son of Alexander Cosby of Stradbally Hall, Queens county, Ireland. He had been Equerry to the Queen and was colonel of the Royal Irish Regiment and retained his rank when he received his appointment as governor. He arrived in New York on the first day of August, 1732, on His Majesty's Ship "Seaford." Cosby probably owed his appointment to the influence of the Duke of Newcastle. He had not long before been removed from the governorship of the Island of Minorca where he had made himself intensely unpopular by his appropriation of the revenues and where he had become involved in serious litigation by his arbitrary confiscation of the property of a Spanish merchant, made prior to a declaration of war between England and Spain. He sold part of the property and retained the proceeds, secreted the papers in the case and denied the injured merchant the right of appeal. He was a man of limited education; he lacked prudence and intelligence and did not distinguish between power and right. He was avaricious and his only idea of diplomacy was superior force. His disposition was haughty and pompous and he was possessed of a violent temper over which he exercised little or no control.—Rutherford p. 6.

² MORRIS, LEWIS. Born 1671, son of Richard Morris of Morrisiana. Member Assembly (Westchester) 1711-1738; Member of Council, 1721-1729; Chief Justice, Supreme Court, 1715-1733; Judge Court of Admiralty for 15 years; Governor of New Jersey 1738-1746.

³ The people had a long list of grievances against their governor. They had been disgusted from the very first with the form and cere-

newspaper called the *Weekly Journal*, was established to defend the popular cause in which able writers attacked the Governor and the Government with great boldness and zeal. Its squibs, ballads and serious charges irritated the Governor and his council to madness; and John Peter Zenger,⁴ its printer, a poor, but energetic and bold man, rendered himself extremely obnoxious to those in authority. The new Chief Justice made strong efforts to procure an indictment against him for a libel. "Sometimes," he told the grand jury, "heavy, half witted men get a knack of rhyming, but it is time to break them of it when they grow abusive, insolent and malicious with it." But the effort was in vain. The grand jury, fresh from the people, could not be induced to assist in the oppression of the people's friend.

The Council then took up the matter, and having examined

mony he affected when he received their representatives. Then shortly after his arrival while making a visit at Albany he deliberately destroyed a deed to the corporation made by the Mohawk Indians. The deed had been made by the Indians for their protection against the rapid settling of the country and was not to take effect until the dissolution of the tribe. It was destroyed because Cosby expected to receive certain fees when a new grant was executed. They had heard, too, that in several instances Cosby had refused to grant lands to settlers unless he was permitted to retain a third for his personal use. They had seen the Chief Justice of their Supreme Court deposed from his office because his opinion on a matter of law differed from the wish of the governor and they rightly inferred that any other official who attempted to stand in his way would be dealt with in the same summary manner. They knew that only such members of the Council were summoned to the meetings as were favorable to Cosby's designs and they therefore began asking themselves if such a man as Van Dam could be wronged, how would a poor man fare? What security did the Province offer for a man's person or property? There were people living who could remember Andros, cruel and despotic; Fletcher, avaricious and fanatical; Cornbury, a bankrupt who came to New York to escape from his creditors; Hunter, timid and weak; and now they were cursed with a Cosby worse in many ways than his predecessors. How long were they to serve as the prey of unprincipled men?

⁴ZENGER was born in Germany and was one of a company of Palatines sent to America in 1710 by Queen Anne. On arrival in New York he was apprenticed to William Bradford for 8 years. Went to Maryland but returned to New York in 1722; was natu-

four of Zenger's newspapers, pronounced them to be false, scandalous, malicious and seditious libels, and ordered them to be burned by the common hangman. But when the order was read in the court of quarter sessions, and the sheriff moved for the compliance of the magistrates, the court would not suffer the order to be entered, and the aldermen offered a protest against it, as an arbitrary and illegal injunction. The sheriff then ordered his negro to burn the papers, which was accordingly done. Zenger was soon after arrested by order of the Council, thrown into jail and denied pen, ink and paper. His friends procured a writ of *habeas corpus*, and upon argument he was admitted to bail, but the amount was fixed so high that he was unable to procure it, and at the next session of the Supreme Court, efforts were vainly made by the judges and the Attorney-General to induce the grand jury to make a presentment against the prisoner. The Attorney-General then filed an information charging him with two libels against the Governor and Council. Zenger's counsel, James Alexander⁵ and William Smith⁶ filed exceptions to the commissions of the judges. The Chief Justice warned them of the consequences and when they persisted, an order

ralized in 1723 and started in the printing business for himself in 1726. Became printer of *New York Weekly Journal* in 1733. He was made public printer in 1737 as a reward for his troubles and was appointed to the same office in New Jersey. He died July 28, 1746 and is said to have been buried in Trinity churchyard. No descendants in the male line remain. His wife published the *Journal* until December 1748 when it was taken over by his son John, who continued it until 1751 when the publication ceased. Zenger was poorly educated and he possessed little experience or skill in his trade. His business ventures up to this time had been failures and with a large family to support he was very poor. It seems certain that he went into the newspaper scheme from a commercial point of view only and without any adequate idea of the results which were to be accomplished.

The "Journal" was a folio in size, with four pages. The press work was better than that of the "Gazette" but there were many grammatical errors, Zenger's knowledge of English being very limited. The paper sold for three shillings per quarter and the advertisements cost three shillings for the first insertion and one shilling for each insertion thereafter. Rutherford, p. 29.

⁵ ALEXANDER, JAMES. Born in Scotland in 1691; came to New York 1715 where he studied law and was admitted to bar. Attorney-

was made striking them from the roll of attorneys. The friends of the printer then sent to Philadelphia and retained for him Andrew Hamilton who, though eighty years of age, was one of the most distinguished lawyers of the country. The trial took place before Chief Justice de Lancey and a jury. The printer pleaded not guilty. Mr. Hamilton admitted that the alleged libels were printed and published by him. The Attorney-General and the Chief Justice both contended that as the prisoner had confessed the publication of the words complained of, the only question was whether they were libelous and this was a question of law for the Court.

Though the law clearly was against him, Mr. Hamilton in a great speech argued to the jury that they had a right to judge not only of the fact of publication but of the whole matter in issue and to return a verdict of not guilty. And though the Chief Justice charged them to the contrary they came back into court with a verdict of not guilty, which was received with cheers by the crowd inside and outside of the court room, and which conducted him to the Black Horse Tavern where he was given a dinner by forty of the leading citizens of New York. The next day the whole city turned out to bid him farewell and he was saluted with the guns of the ships in the harbor. The common council of New York presented him the freedom of the city, "under a grateful sense of the remarkable service done by him to the city and colony, by his learned and generous defence of the rights of mankind and the liberty of the press." A gold box, in which to enclose the certificate of the freedom, was also purchased by subscription, on which the arms of the city were engraved, encircled with the words: "*Demersae leges—timefacta libertas—haec tandem emergunt:*" "*Non nummis, virtute paratur:*" "*Ita cuique eveniat ut de republica meruit.*"

General 1728. Member of Council 1721-1737; 1750-1756. Member of Assembly 1737.

^c **SMITH, WILLIAM.** Born in England 1697. Recorder, New York, 1736. One of the Incorporators of Princeton College. Atty-Gen. 1751. Member of Council, 1753-1767. Justice Supreme Court 1763-1769.

^r **CHANDLER**, p. 202.

THE TRIAL.⁸

In the Supreme Court of Judicature, New York City, 1735.

HON. JAMES DE LANCEY,⁹ *Chief Justice.*

FREDERICK PHILIPSE,¹⁰ *Second Justice.*

August 4.

The prisoner, John Peter Zenger, was charged by information for a misdemeanor in printing in two numbers of his *New York Weekly Journal*, the following "false, scandalous, malicious, and seditious libels" of and concerning Governor Crosby, and his council:

"Your appearance in print, at last, gives a pleasure to many, though most wish you had come fairly into the open field, and not appeared behind retrenchments made of the supposed laws against

⁸ *Bibliography.* The Trial of John Peter Zenger, of New York, Printer, who was charged with having printed and published a Libel against the Government and acquitted, with a narrative of his case. To which is now added, being never printed before, the Trial of Mr. William Owen, Bookseller near Temple Bar, who was also charged with the publication of a Libel against the Government: of which he was honourably acquitted by a Jury of free born Englishmen, Citizens of London. London, Printed for J. Almon, opposite Burlington House, Piccadilly, MDCCLXV.

*American Criminal Trials, by Peleg W. Chandler, Vol. 1. See I, Am. St. Tr. 116.

*Howell's State Trials, Vol. 17, pp. 675-764.

*John Peter Zenger, His Press, His Trial and a bibliography of Zenger Imprints. By Livingston Rutherford. Also a reprint of the first edition of the trial. New York, Dodd, Mead and Company, mcmiv.

This is a limited edition of 325 copies, printed on special paper with numerous portraits. It contains also a complete bibliography of the trial. Besides the reports mentioned above there are in print the following: (1) The report of the trial published by Zenger himself in 1736 in New York; (2) Boston, 1738; (3) London, 1738; 1750; 1752; 1756; (4) New York, 1770; (5) London, 1784; (6) Boston, 1799.

⁹ DE LANCEY, JAMES (1703-1760). Born and died in New York City; educated at Cambridge Univ. England. Admitted to English Bar but returned to New York. Member Colonial Council, 1729. Author of Montgomery Charter of New York City, 1730; Chief Justice, New York, 1733; Colonial Governor, 1753; Governor, 1755-1760.

¹⁰ PHILIPSE, FREDERICK. Born in Barbadoes and married a daughter of Anthony Brockholst. A worthy gentleman of plentiful fortune "though with no pretensions to learning of any kind." He died in 1751.

libelling; these retrenchments, gentlemen, may soon be shown to you and all men to be very weak, and to have neither law nor reason for their foundation, so cannot long stand you in stead: therefore, you had much better as yet leave them, and come to what the people of this city and province think are the points in question. They think as matters now stand, that their liberties and properties are precarious, and that slavery is like to be entailed on them and their posterity, if some past things be not amended, and this they collect from many past proceedings." "One of our neighbors of New Jersey being in company, observing the strangers of New York full of complaints, endeavored to persuade them to remove into Jersey; to which it was replied, that would be leaping out of the frying pan into the fire; for, says he, we both are under the same governor, and your assembly have shown with a witness, what is to be expected from them; one that was then moving from New York to Pennsylvania, to which place it is reported several considerable men are removing, expressed in terms very moving, much concern for the circumstances of New York, and seemed to think them very much owing to the influence that some men had in the administration; said he was now going from them, and was not to be hurt by any measures they should take; but could not help having some concern for the welfare of his countrymen, and should be glad to hear that the assembly would exert themselves as become them, by showing that they have the interest of their country more at heart, than the gratification of any private view of any of their members; or being at all affected by the smiles or frowns of a governor; both which ought equally to be despised, when the interest of their country is at stake. You, says he, complain of the lawyers, but I think the law itself is at an end. We see men's deeds destroyed, judges arbitrarily displaced, new courts erected without consent of the legislature, by which it seems to me, trials by juries are taken away when a governor pleases; men of known estates denied their votes, contrary to the received practice of the best expositor of any law. Who is there in that province that can call any thing his own, or enjoy any liberty longer than those in the administration will condescend to let them do it, for which reason I left it, as I believe more will."

Richard Bradley,¹¹ Attorney-General, for The Prosecution: *Andrew Hamilton*¹² and *John Chambers*,¹³ for the Prisoner.

The following jurors were selected and sworn: Hermanus Rutgers, Stanly Holmes, Edward Man, John Bell, Samuel

¹¹ See I Am. St. Tr. 117.

¹² ANDREW HAMILTON had long been prominent in Pennsylvania affairs. He is said to have been born in Scotland in 1656. There is some uncertainty about his real name as at one time he was called Trent. He was Attorney-General of Pennsylvania 1717-26. Recorder of Philadelphia, 1727. Vice Admiralty Judge 1737.

Weaver, Andries Marsehalk, Egbert Van Borsom, Thomas Hunt, *foreman*, Benjamin Hildreth, Abraham Keteltas, John Goelet, Hercules Wendover.

The Prisoner pleaded *not guilty*.

Mr. Hamilton: May it please your honor: I am concerned in this cause on the part of Mr. Zenger, the defendant. The information against my client was sent to me a few days before I left home, with some instructions to let me know how far I might rely upon the truth of those parts of the papers set forth in the information, and which are said to be libelous. And though I am perfectly of opinion with the gentleman who has just now spoken, on the same side with me, as to the common course of proceedings, I mean in putting Mr. Attorney upon proving, that my client printed and published those papers mentioned in the information; yet I cannot think it proper for me, without doing violence to my own principles, to deny the publication of a complaint which I think it is the right of every free-born subject to make, when the matters so published can be supported with truth; and, therefore, I will save Mr. Attorney the trouble of examining his witnesses to that point; and I do for my client confess, that he both printed and published the two newspapers set forth in the information; and I hope in so doing he has committed no crime.

The Attorney-General: Then, if your honor pleases, as Mr. Hamilton has confessed the printing and publishing these libels, I think the jury must find a verdict for the king; for supposing they were true, the law says that they are not the less libelous for that; indeed, their being true is an aggravation of the crime.

Speaker of the Assembly from 1729 to 1739 with the exception of one year. He and Alexander had long been associates in many cases. In 1726 when Hamilton was in London probating the will of William Penn in Chancery he wrote Alexander of the delays and difficulties of the practice, saying: "Could ye Devil be obliged to appear to a bill of Chancery and to bear ye costs and attend ye Issue of ye cause, I would for any ill turn he should do me, doom him to endure this Curse instead of going to Hell."

On being written to, Hamilton promptly expressed his willingness to come on and try the case. He was at that time nearly eighty years of age. He was a great sufferer from gout and for a while it was quite uncertain whether he would be able to appear. His intellect however was vigorous and unclouded. He had the reputation of being the best advocate in North America and was probably the only American who was ever admitted a bencher of Gray's Inn. Rutherford p. 58. He received no pecuniary compensation for his services in this Trial.

¹² CHAMBERS, JOHN (1710-1765). Member Executive Council 1754; soon afterwards appointed judge and still later became Chief Justice of New York. Died New York City. See I Am. St. Tr. 117.

Mr. Hamilton: Not so either, Mr. Attorney, there are two words to that bargain. I hope it is not our bare printing and publishing a paper that will make it a libel: you will have something more to do before you make my client a libeler; for the words themselves must be libelous, that is, "false, scandalous, and seditious," or else he is not guilty.

The Attorney-General remarked upon the excellency as well as the use of government, and the great regard and reverence which had been constantly paid to it, both under the law and the gospel. By government, individuals were protected in their lives, religion and property, and for these reasons, great care had always been taken to prevent every thing that might tend to scandalize magistrates and others concerned in the administration of government, especially the supreme magistrate. He mentioned many instances of punishments inflicted upon those who had attempted to bring the government into contempt by publishing false and scurrilous libels against it, or by speaking evil and scandalous words of men in authority, to the great disturbance of the public peace. A libel, he insisted, was a malicious defamation of any person, expressed either in printing or writing, signs or pictures, to asperse the reputation of one that was alive, or the memory of one that was dead. If he was a private man the libeler deserved a severe punishment, but if it was against a magistrate or other public person, it was a greater offense; as this concerned not only the breach of the peace, but the scandal of the government; for what greater scandal of the government could there be, than to have corrupt or wicked magistrates to be appointed by the king, to govern his subjects under him? And a greater imputation to the state cannot be than to suffer such corrupt men to sit in the sacred seat of justice, or to have any concern in the administration of justice: and he insisted, that whether the person defamed was a private man or a magistrate, whether living or dead, whether the libel was true or false, or if the party against whom it was made was of good or evil fame, it was nevertheless a libel; for in a settled state of government, the party aggrieved ought to complain for every injury done him, in the ordinary course of the law. As to its publication, the law had taken so great care of men's reputations, that if one maliciously repeated, or signed it, in the presence of another, or delivered the libel or a copy of it over, to scandalize the party, he was to be punished as the publisher of a libel. He said it was likewise evident, that libeling was an offense against the law of God. "Then said Paul, I wist not, brethren, that he was the high priest; for it is written, thou shalt not speak evil of the ruler of thy people." Acts xxiii. 5. "Presumptuous are they, self-willed, they are not afraid to speak evil of dignities." 2 Pet. ii. 10. He then insisted, that it was clear, both by the law of God and man, that it was a very great offence to speak evil of, or to revile, those in authority over us; and that Mr. Zenger had offended in a most notorious and gross manner, in scandalizing his excellency the governor, who was the king's immediate representative, and the

supreme magistrate of the province. He acknowledged that the governor and the chief persons in the government had directed this prosecution, to put a stop to this scandalous and wicked practice of libeling and defaming his majesty's government and disturbing his majesty's peace.

Mr. Hamilton. May it please your honor: I agree with Mr. Attorney, that government is a sacred thing; but I differ very widely from him when he would insinuate that the just complaints of a number of men, who suffer under a bad administration, is libeling that administration. Had I believed that to be law, I should not have given the court the trouble of hearing any thing I could say in this cause. I own, when I read the information, I had not the art to find out, without the help of Mr. Attorney's inuendos, that the governor was the person meant in every period of that newspaper. I was inclined to believe that they were written by some, who, from an extraordinary zeal for liberty, had misconstrued the conduct of some persons in authority into crimes; and that Mr. Attorney, from his too great zeal for power, had exhibited this information, to correct the indiscretion of my client; and, at the same time, to show his superiors the great concern he had, lest they should be treated with any undue freedom. But from what Mr. Attorney has just now said, that this prosecution was directed by the governor and council; and from the extraordinary appearance of people of all conditions, which I observe in court upon this occasion, I have reason to think, that those in the administration have by this prosecution something more in view, and that the people believe they have a good deal more at stake, than I apprehend: and, therefore, as it has become my duty to be both plain and particular in this cause, I beg leave to bespeak the patience of the court.

Is it not surprising to see a subject, upon his receiving a commission from the king to be a governor of a colony in America, immediately imagining himself to be vested with all the prerogatives belonging to the sacred person of his prince? and, which is yet more astonishing, to see that a people can be so wild as to allow of, and acknowledge, those prerogatives and exemptions, even to their own destruction? Is it so hard a matter to distinguish between the majesty of our sovereign, and the power of a governor of the plantations? Is not this making very free with our prince, to apply that regard, obedience, and allegiance to a subject which is due only to our sovereign? And yet in all the cases which Mr. Attorney has cited, to show the duty and obedience we owe to the supreme magistrate, it is the king which is there meant and understood, though Mr. Attorney is pleased to urge them as authorities to prove the heinousness of Mr. Zenger's offense against the governor of New York. The several plantations are compared to so many large corporations, and perhaps not improperly; and can any one give an instance, that the mayor, or head of a corporation, ever put in a claim to the sacred rights of majesty? Let us not, while we are pretending to pay a great regard to our prince and

his peace, make bold to transfer that allegiance to a subject, which we owe to our king only.

What a strange doctrine it is, to press every thing for law here which is so in England! I believe we should not think it a favor, at present at least, to establish this practice. In England so great a regard and reverence is had to the judges, that, if any man strike another in Westminster Hall, while the judges are sitting, he shall lose his right hand, and forfeit his land and goods, for so doing. And though the judges here claim all the powers and authorities within this government, that a court of king's bench has in England; yet I believe Mr. Attorney will scarcely say that such a punishment could be legally inflicted on a man for committing such an offense, in the presence of the judges sitting in any court within the province of New York. The reason is obvious; a quarrel or riot in New York cannot possibly be attended with those dangerous consequences that it might in Westminster Hall; nor will it be alleged, that any misbehavior to a governor in the plantations will, or ever ought to be, judged of or punished, as a like undutifulness would be to our sovereign.

From all which, I hope Mr. Attorney will not think it proper to apply those law cases to support the cause of his governor, which have only been judged where the king's safety or honor was concerned. It will not be denied, that a freeholder in the province of New York has as good a right to the sole and separate use of his lands, as a freeholder in England, who has a right to bring an action of trespass against his neighbor, for suffering his horse or cow to come and feed upon his lands or eat his corn, whether inclosed or not inclosed; and yet I believe it would be looked upon as a strange attempt, for one man here to bring an action against another, whose cattle and horses feed upon his grounds not inclosed, or, indeed, for eating and treading down his corn, if that were not inclosed. Numberless are the instances of this kind that might be given, to show that what is good law at one time and in one place, is not so at another time and in another place; so that, I think, the law seems to expect, that in these parts of the world men should take care, by a good fence, to preserve their property from the injury of unruly beasts: and perhaps there may be as good reason why men should take the same care to make an honest and upright conduct a fence and security against the injury of unruly tongues.

The Attorney-General: I do not know what the gentleman means, by comparing cases of freeholders in England with the freeholders here. What has this case to do with actions of trespass, or men's fencing their grounds? The case before the court is, whether Mr. Zenger is guilty of libeling his excellency the governor of New York, and, indeed, the whole administration of the government? Mr. Hamilton has confessed the printing and publishing; and I think nothing is plainer than that the words in the information are scandalous, and tend to sedition, and to disquiet the minds of

the people of this province: if such papers are not libels, I think it may be said there can be no such thing as a libel.

Mr. Hamilton: May it please your honor, I cannot agree with Mr. Attorney: for though I freely acknowledge that there are such things as libel, yet I must insist at the same time, that what my client is charged with is not a libel; and I observed just now that Mr. Attorney, in defining a libel, made use of the words *scandalous, seditious, and tend to disquiet the people*; but, whether with design or not I will not say, he omitted the word *false*.

The Attorney-General: I think I did not omit the word *false*; but it has been said already, that it may be a libel, notwithstanding it may be true.

Mr. Hamilton: In this I must still differ with Mr. Attorney; for I depend upon it, we are to be tried upon this information now before the court and jury, and to which we have pleaded not guilty; and by it we are charged with printing and publishing a certain "*false, malicious, seditious and scandalous libel.*" This word *false* must have some meaning, or else how came it there? I hope Mr. Attorney will not say he put it there by chance, and I am of opinion his information would not be good without it. But to show that it is the principal thing which, in my opinion, makes a libel, I put the case, that the information had been for printing and publishing a certain *true* libel, would that be the same thing? or could Mr. Attorney support such an information by any precedent in the English law? No; the falsehood makes the scandal, and both make the libel. And to show the court that I am in good earnest and to save the court's time and Mr. Attorney's trouble, I will agree, that if he can prove the facts charged upon us, to be false, I will own them to be scandalous, seditious, and a libel. So the work seems now to be pretty much shortened, and Mr. Attorney has only to prove the words false, in order to make us guilty.

The Attorney-General: We have nothing to prove; you have confessed the printing and publishing; but if it was necessary, as I insist it is not, how can we prove a negative? But I hope some regard will be had to the authorities that have been produced; and that, supposing all the words to be true, yet that will not help them.

Mr. Hamilton: I did expect to hear that a negative cannot be proved; but every body knows there are many exceptions to that general rule: for if a man is charged with killing another, or stealing his neighbor's horse; if he is innocent in the one case, he may prove the man, said to be killed, to be really alive; and the horse, said to be stolen, never to have been out of his master's stable, and this I think is proving a negative. But we will save Mr. Attorney the trouble of proving a negative, and take the *onus probandi* upon ourselves, and prove those very papers that are called libels to be true.

THE CHIEF JUSTICE: You cannot be admitted, Mr. Hamilton, to give the truth of a libel in evidence; a libel is not to be justified; for it is nevertheless a libel, that it is true.

Mr. Hamilton: I am sorry the court has so soon resolved on that piece of law; I expected first to have been heard to that point. I have not, in all my reading, met with an authority that says, we cannot be admitted to give the truth in evidence, upon an information for a libel.

THE CHIEF JUSTICE: The law is clear, that you cannot justify a libel.

Mr. Hamilton: I own that, may it please your honor, to be so; but, with submission, I understand the word justify there, to be a justification by plea, as it is in the case upon an indictment for murder, or an assault and battery; there the prisoner cannot justify, but must plead not guilty: yet it will not be denied but he may be, and always is, admitted to give the truth of the fact, or any other matter, in evidence, which goes to his acquittal; as in murder he may prove it was in defense of his life, his house, &c.; and in assault and battery, he may give in evidence that the other party struck first, and in both cases he will be acquitted. In this sense I understand the word justify, when applied to the case before the court.

THE CHIEF JUSTICE: Show, I pray, that you can give the truth of a libel in evidence.

Mr. Hamilton: I am ready, both from what I understand to be the authorities in the case, and from the reason of the thing, to show that we may lawfully do so. But here I beg leave to observe, that an information for libel is the child, if not born, yet nursed and brought up to full maturity, in the court of star chamber.

THE CHIEF JUSTICE: Mr. Hamilton, you will find yourself mistaken; for in Coke's Institutes you will find informations for libels, long before the court of star chamber.

Mr. Hamilton said that the doctrine, declaring that truth makes a worse libel than falsehood, was monstrous and ridiculous. He commented upon all the leading English decisions on the subject, and relied particularly on a case in which Lord Chief Justice Holt demanded of a person accused as a libeler: "Can you make it appear they are true? Have you any witnesses? You might have had subpoenas for your witnesses against this day. If you take upon you to write such things as you are charged with, it lies upon you to prove them true, at your peril. If you have any witnesses, I will hear them. How came you to write those books which are not true? If you have any witnesses, produce them. If you can offer any matter to prove what you have wrote, let us hear it." Now, sir, we have acknowledged the printing and publishing of the papers set forth in the information, and agreeably to the rule laid down by Lord Holt, we are ready to prove them to be true, at our peril.

The Attorney-General: The law is clear, that a libel can not be justified by proof that it is true.

THE CHIEF JUSTICE: Mr. Hamilton, the court is of opinion that you ought not to be permitted to prove the facts in the papers; these are the words of the book: "It is far from being a justifica-

tion of a libel, that the contents thereof are true, or that the person upon whom it is made had a bad reputation, since the greater appearance there is of truth in any malicious invective, so much the more provoking it is."

Mr. Hamilton: These are star chamber cases, and I was in hopes that practice had been dead with the court.

THE CHIEF JUSTICE: Mr. Hamilton, the court have delivered their opinion, and we expect you will use us with good manners; you are not to be permitted to argue against the opinion of the court.

Mr. Hamilton: With submission, I have seen the practice in very great courts, and never heard it deemed unmannerly to —

THE CHIEF JUSTICE: After the court have declared their opinion, it is not good manners to insist upon a point in which you are overruled.

Mr. Hamilton: I will say no more at this time; the court, I see, is against us on this point; and that, I hope, I may be allowed to say.

THE CHIEF JUSTICE: Use the court with good manners, and you shall be allowed all the liberty you can reasonably desire.

MR. HAMILTON'S SPEECH TO THE JURY.

Mr. Hamilton: Then, gentlemen of the jury, it is to you we must now appeal for witnesses to the truth of the facts we have offered and are denied the liberty to prove; and let it not seem strange, that I apply myself to you in this manner; I am warranted so to do both by law and reason. The law supposes you to be summoned out of the neighborhood where the fact is alleged to be committed; and the reason of your being taken out of the neighborhood is, because you are supposed to have the best knowledge of the fact that is to be tried; and were you to find a verdict against my client you must take upon you to say, that the papers referred to in the information, and which we acknowledge we printed and published, are false, scandalous, and seditious; but of this I can have no apprehension. You are citizens of New York; you are really what the law supposes you to be, honest and lawful men; and the facts which we offer to prove were not committed in a corner; they are notoriously known to be true; and therefore in your justice lies our safety. And as we are denied the liberty of giving evidence, to prove the truth of what we have published, I will beg leave to lay it down

as a standing rule in such cases, that the suppressing of evidence ought always to be taken for the strongest evidence: and I hope it will have that weight with you. But since we are not admitted to examine our witnesses, I will endeavor to shorten the dispute with Mr. Attorney, and to that end I desire he would favor us with some standard definition of a libel, by which it may be certainly known, whether a writing be a libel, yea or not.

The Attorney General: The books, I think, have given a very full definition of a libel; they say it is, in a strict sense, taken for a malicious defamation, expressed either in writing or printing, and tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and to expose him to public hatred, contempt, or ridicule. But it is said, that in a larger sense the notion of a libel may be applied to any defamation whatsoever, expressed either by signs or pictures; as by fixing up a gallows against a man's door, or by painting him in a shameful and ignominious manner. And since the chief cause, for which the law so severely punishes all offences of this nature, is the direct tendency of them to a breach of the public peace, by provoking the parties injured, their friends and families, to acts of revenge, which it would be impossible to restrain by the severest laws, were there no redress from public justice for injuries of this kind, which of all others are most sensibly felt; and since the plain meaning of such scandal, as is expressed by signs or pictures, is as obvious to common sense, and as easily understood by every common capacity, and altogether as provoking, as that which is expressed by writing or printing, why should it not be equally criminal? From the same ground it seems also clearly to follow, that such scandal as is expressed in a scoffing and ironical manner makes a writing as properly a libel as that which is expressed in direct terms; as where a writing, in a taunting manner, reckoning up several acts of public charity done by one, says, "You will not play the Jew, nor the hypocrite," and so goes on in a strain of ridicule to insinuate, that what he did was owing to his vain glory; or where a writing, pretending to recommend to one the characters of several great men for his imitation, instead of taking notice of what they are generally esteemed famous for, pitched on such qualities only which their enemies charge them with the want of, as by proposing such a one to be imitated for his courage, who is known to be a great statesman, but no soldier; and another to be imitated for his learning, who is known to be a great general, but no scholar, &c., which kind of writing is as well understood to mean only to upbraid the parties with the want of these qualities, as if it had directly and expressly done so.¹⁴

¹⁴ Hawkins, ch. 73, § 1. *et seq.* 15°.

Mr. Hamilton: Ay, Mr. Attorney; but what certain standard rule have the books laid down, by which we can certainly know, whether the words or the signs are malicious? Whether they are defamatory? Whether they tend to the breach of the peace; and are a sufficient ground to provoke a man, his family, or friends, to acts of revenge, especially those of the ironical sort of words? And what rule have you to know when I write ironically? I think it would be hard, when I say, such a man is a very worthy, honest gentleman, and of fine understanding, that therefore I meant he was a knave or a fool.

The Attorney-General: I think the books are very full; it is said in the book just now read: "That such scandal as is expressed in a scoffing and ironical manner, makes a writing as properly a libel, as that which is expressed in direct terms; as where a writing, in a taunting manner, reckoning up several acts of charity done by one, says, 'You will not play the Jew or the hypocrite;' and so goes on to insinuate, that what he did was owing to his vain glory, &c. Which kind of writing is well understood to mean only to upbraid the parties with the want of these qualities, as if it had directly and expressly done so." I think nothing can be plainer or more full than these words.

Mr. Hamilton: I agree the words are very plain, and I shall not scruple to allow (when we are agreed that the words are false and scandalous, and were spoken in an ironical and scoffing manner,) that they are really libelous; but here still occurs the uncertainty, which makes it difficult to know, what words are scandalous, and what not; for you say, they may be scandalous, true or false: besides, how shall we know whether the words were spoke in a scoffing and ironical manner, or seriously? Or how can you know, whether the man did not think as he wrote? For, by your rule, if he did, it is no irony, and consequently no libel. But, under favor, Mr. Attorney, I think the same book, and the same section, will show us the only rule by which all these things are to be known. The words are these; "Which kind of writing is as well understood to mean only to upbraid the parties with the want of these qualities, as if they had directly and expressly done so." Here it is plain, the words are scandalous, scoffing, and ironical, only as they are understood. I know no

rule laid down in the books but this: I mean, as the words are understood.

THE CHIEF JUSTICE: Mr. Hamilton, do you think it so hard to know when words are ironical, or spoken in a scoffing manner?

Mr. Hamilton: I own it may be known; but I insist, the only rule to know is, as I do or can understand them; I have no other rule to go by, but as I understand them.

THE CHIEF JUSTICE: That is certain. All words are libelous or not, as they are understood. Those who are to judge of the words, must judge whether they are scandalous or ironical, tend to the breach of the peace, or are seditious: there can be no doubt of it.

Mr. Hamilton: I thank your honor; I am glad to find the court of this opinion. Then it follows that those twelve men must understand the words in the information to be scandalous, that is to say, false; for I think it is not pretended that they are of the ironical sort; and when they understand the words to be so, they will say we are guilty of publishing a false libel, and not otherwise.

THE CHIEF JUSTICE: No, Mr. Hamilton; the jury may find that Zenger printed and published those papers, and leave it to the court to judge whether they are libelous; you know this is very common; it is in the nature of a special verdict, where the jury leave the matter of law to the court.

Mr. Hamilton: I know, may it please your honor, the jury may do so; but I do likewise know, they may do otherwise. I know they have the right beyond all dispute, to determine both the law and the fact, and where they do not doubt of the law, they ought to do so. This manner of leaving it to the judgment of the court whether the words are libelous or not, in effect renders juries useless, to say no worse, in many cases; but this I shall have occasion to speak to by and by; and I will, with the court's leave, proceed to examine the inconveniences that must inevitably arise from the doctrines Mr. Attorney has laid down; and I observe, in support of this prosecution, he has frequently repeated the words taken from the case *de Libellis famosis* in the fifth of Coke. This is indeed the leading case, to which almost all the other cases

upon the subject of libels refer ; and I must insist upon saying, that according as this case seems to be understood by the court and Mr. Attorney, it is not law at this day. For though I own it to be base and unworthy to scandalize any man, yet I think it is even villainous to scandalize a person of public character, and I will go so far into Mr. Attorney's doctrine as to agree, that if the faults, mistakes, nay even the vices of such a person be private and personal, and do not affect the peace of the public, or the liberty or property of our neighbor, it is unmanly and unmannerly to expose them either by word or writing. But when a ruler of a people brings his personal failings, but much more his vices, into his administration, and the people find themselves affected by them, either in their liberties or properties, that will alter the case mightily ; and all the high things that are said in favor of rulers, and of dignities, and upon the side of power, will not be able to stop people's mouths when they feel themselves oppressed,—I mean in a free government. It is true in times past it was a crime to speak truth, and in that terrible court of star chamber, many worthy and brave men suffered for so doing ; and yet even in that court, and in those bad times, a great and good man durst say, what I hope will not be taken amiss of me to say in this place, that the practice of informations for libels is a sword in the hands of a wicked king, and an arrant coward, to cut down and destroy the innocent ; the one cannot, because of his high station, and the other dares not, because of his want of courage, revenge himself in another manner.

The Attorney-General: Pray, Mr. Hamilton, have a care what you say, do not go too far either ; I do not like those liberties.

Mr. Hamilton: Sure, Mr. Attorney, you will not make any applications ; all men agree that we are governed by the best of kings, and I cannot see the meaning of Mr. Attorney's caution ; my well known principles, and the sense I have of the blessings we enjoy under his present majesty, make it impossible for me to err, and I hope, even to be suspected, in that point of duty to my king. May it please your honor,

I was saying, that notwithstanding all the duty and reverence claimed by Mr. Attorney to men in authority, they are not exempt from observing the rules of common justice, either in their private or public capacities; the laws of our mother country know no exemption. It is true, men in power are harder to be come at for wrongs they do, either to a private person, or to the public; especially a governor in the plantations, where they insist upon an exemption from answering complaints of any kind in their own government. We are indeed told, and it is true, they are obliged to answer a suit in the king's courts at Westminster, for a wrong done to any person here; but do we not know how impracticable this is to most men among us,—to leave their families, who depend upon their labor and care for their livelihood, and carry evidences to Britain, and at a great, nay, a far greater expense than almost any of us are able to bear, only to prosecute a governor for an injury done here. But when the oppression is general, there is no remedy even that way; no, our constitution has, (blessed be God) given us an opportunity, if not to have such wrongs redressed, yet by our prudence and resolution to prevent in a great measure the committing of such wrongs, by making a governor sensible that it is his interest to be just to those under his care; for such is the sense, that men in general (I mean freemen) have of common justice, that when they come to know that a chief magistrate abuses the power with which he is trusted for the good of the people, and is attempting to turn that very power against the innocent, whether of high or low degree, I say, mankind in general seldom fail to interpose, and as far as they can, prevent the destruction of their fellow subjects. And has it not often been seen (and I hope it will always be seen) that when the representatives of a free people are by just representations or remonstrances, made sensible of the sufferings of their fellow subjects, by the abuse of power in the hands of a governor, they have declared (and loudly too) that they were not obliged by any law to support a governor who goes about to destroy a province or colony, or their privileges, which by his majesty he was appointed, and by the law he is

bound, to protect and encourage. But I pray it may be considered, of what use is this mighty privilege if every man that suffers must be silent? And if a man must be taken up as a libeler for telling his sufferings to his neighbor? I know it may be answered, have you not a legislature? Have you not a house of representatives to whom you may complain? And to this I answer, we have. But what then? Is an assembly to be troubled with every injury done by a governor? Or are they to hear of nothing but what those in the administration will please to tell them? Or what sort of a trial must a man have? and how is he to be remedied—especially if the case were, as I have known it to happen in America in my time, that a governor who has places (I will not say pensions, for I believe they seldom give that to another which they can take to themselves) to bestow, and can or will keep the same assembly, after he has modeled them so as to get a majority of the house in his interest, for near twice seven years together? I pray, what redress is to be expected for an honest man, who makes his complaint against a governor, to an assembly who may properly enough be said to be made by the same governor against whom the complaint is made? The thing answers itself. No, it is natural, it is a privilege. I will go farther, it is a right which all freemen claim, and are entitled to complain, when they are hurt; they have a right publicly to remonstrate against abuses of power, in the strongest terms, to put their neighbors upon their guard against the craft or open violence of men in authority, and to assert with courage the sense they have of the blessings of liberty, the value they put upon it, and their resolution at all hazards to preserve it as one of the greatest blessings heaven can bestow. And when a house of assembly composed of honest freemen sees the general bent of the people's inclinations, that is it, which must and will—I am sure it ought to—weigh with a legislature, in spite of all the craft, caressing and cajoling, made use of by a governor, to divert them from hearkening to the voice of their country.

As we all very well understand the true reason, why gentlemen take so much pains and make such great interest

to be appointed governors, so is the design of their appointment not less manifest. We know his majesty's gracious intentions to his subjects; he desires no more than that his people in the plantations should be kept up to their duty and allegiance to the crown of Great Britain, that peace may be preserved amongst them, and justice impartially administered; that we may be governed so as to render us useful to our mother country, by encouraging us to make and raise such commodities as may be useful to Great Britain. But will any one say, that all or any of these good ends are to be effected by a governor's setting his people together by the ears, and by the assistance of one part of the people plaguing and plundering the other? The commission which governors bear, while they execute the powers given them, according to the intent of the royal grantor, expressed in their commissions, requires and deserves very great reverence and submission; but when a governor departs from the duty enjoined on him by his sovereign, and acts as if he was less accountable than the royal hand that gave him all that power and honor which he is possessed of; this sets people upon examining and inquiring into the power, authority, and duty of such a magistrate, and to compare those with his conduct; and just as far as they find he exceeds the bounds of his authority, or falls short in doing impartial justice to the people under his administration, so far they very often, in return, come short in their duty to such a governor. For power alone will not make a man beloved, and I have heard it observed that the man who was neither good nor wise before his being made a governor, never mended upon his preferment, but has been generally observed to be worse: for men who are not endued with wisdom and virtue can only be kept in bounds by the law; and by how much the further they think themselves out of the reach of the law, by so much the more wicked and cruel men are. I wish there were no instances of the kind at this day. And wherever this happens to be the case of a governor, unhappy are the people under his administration,

and in the end he will find himself so too; for the people will neither love him nor support him.

I make no doubt but there are those here who are zealously concerned for the success of this prosecution; and yet I hope there are not many, and even some of those, I am persuaded (when they consider to what lengths such prosecutions may be carried, and how deeply the liberties of the people may be affected by such means,) will not all abide by their present sentiments; I say, not all: for the man who from an intimacy and acquaintance with a governor has conceived a personal regard for him, the man who has felt none of the strokes of his power, the man who believes that a governor has a regard for him and confides in him, it is natural for such men to wish well to the affairs of such a governor; and as they may be men of honor and generosity, they may and no doubt will wish him success, so far as the rights and privileges of their fellow citizens are not affected. But as men of honor, I can apprehend nothing from them; they will never exceed that point.

There are others that are under stronger obligations, and those are such as are in some sort engaged in support of a governor's cause, by their own or their relations' dependence on his favor, for some post or preferment; such men have what is commonly called duty and gratitude, to influence their inclinations, and oblige them to go his lengths. I know men's interests are very near to them, and they will do much rather than forego the favor of a governor and a livelihood at the same time; but I can with very just grounds hope, even from those men whom I will suppose to be men of honor and conscience too, that when they see the liberty of their country is in danger, either by their concurrence, or even by their silence, they will, like Englishmen, and like themselves, freely make a sacrifice of any preferment or favor, rather than be accessory to destroying the liberties of their country, and entailing slavery upon their posterity.

There is indeed another set of men of whom I have no hopes, I mean such who lay aside all other considerations,

and are ready to join with power in any shapes, and with any man or sort of men, by whose means or interest they may be assisted to gratify their malice and envy against those whom they have been pleased to hate; and that for no other reason but because they are men of abilities and integrity, or at least are possessed of some valuable qualities far superior to their own. But as envy is the sin of the devil, and therefore very hard, if at all, to be repented of, I will believe there are but few of this detestable and worthless sort of men, nor will their opinions or inclinations have any influence upon this trial. But to proceed; I beg leave to insist that the right of complaining or remonstrating is natural; and the restraint upon this natural right is the law only, and that those restraints can only extend to what is false: for as it is truth alone which can excuse or justify any man for complaining of a bad administration, I as frankly agree, that nothing ought to excuse a man who raises a false charge or accusation, even against a private person, and that no manner of allowance ought to be made to him who does so against a public magistrate. Truth ought to govern the whole affair of libels, and yet the party accused runs risk enough even then; for if he fails of proving every tittle of what he has written, and to the satisfaction of the court and jury too, he may find to his cost, that when the prosecution is set on foot by men in power it seldom wants friends to favor it. And from thence, it is said, has arisen the great diversity of opinions among judges, about what words were or were not scandalous or libelous. I believe it will be granted that there is not greater uncertainty in any part of the law, than about words of scandal; it would be misspending of the court's time to mention the cases; they may be said to be numberless; and therefore the utmost care ought to be taken in following precedents; and the times when the judgments were given, which are quoted for authorities in the case of libels, are much to be regarded. I think it will be agreed that ever since the time of the star chamber, where the most arbitrary and destructive judgments and opinions were given, that ever an Englishman heard of,

at least in his own country: I say, prosecutions for libels since the time of that arbitrary court, and until the glorious revolution, have generally been set on foot at the instance of the crown or its ministers; and it is no small reproach to the law that these prosecutions were too often and too much countenanced by the judges, who held their places at pleasure, (a disagreeable tenure to any officer, but a dangerous one in the case of a judge). To say more to this point may not be proper. And yet I cannot think it unwarrantable to show the unhappy influence that a sovereign has sometimes had, not only upon judges, but even upon parliaments themselves.

It has already been shown how the judges differed in their opinions about the nature of a libel, in the case of the seven bishops. There you see three judges of one opinion, that is, of a wrong opinion, in the judgment of the best men in England, and one judge of a right opinion. How unhappy might it have been for all of us at this day, if that jury had understood the words in that information as the court did? Or if they had left it to the court to judge whether the petition of the bishops was or was not a libel? No, they took upon them, to their immortal honor, to determine both law and fact, and to understand the petition of the bishops to be no libel; that is, to contain no falsehood nor sedition, and therefore found them not guilty. And remarkable is the case of Sir Samuel Barnardiston, who was fined ten thousand pounds for writing a letter, in which, it may be said, none saw any scandal or falsehood but the court and jury; for that judgment was afterwards looked upon as a cruel and detestable judgment, and therefore was reversed by parliament. Many more instances might be given of the complaisance of court judges, about those times and before; but I will mention only one case more, and that is the case of Sir Edward Hales, who though a Roman Catholic, was by king James II preferred to be a colonel of his army, notwithstanding the statute of 25 Charles II, chapter second, by which it is provided, that every one that accepts of an office, civil or military &c., shall take the

oaths, subscribe the declaration, and take the sacrament, within three months, &c., otherwise he is disabled to hold such office, and the grant for the same to be null and void, and the party to forfeit five hundred pounds. Sir Edward Hales did not take the oaths or sacrament, and was prosecuted for five hundred pounds for exercising the office of a colonel, by the space of three months, without conforming as in the act is directed. Sir Edward pleads that the king by his letters patents did dispense with his taking the oaths and sacraments, and subscribing the declaration, and had pardoned the forfeiture of five hundred pounds. And whether the king's dispensation was good, against the said act of parliament? was the question. I shall mention no more of this case, than to show how in the reign of an arbitrary prince, where judges hold their seats at pleasure, their determinations have not always been such as to make precedents of, but the contrary; and so it happened in this case, where it was solemnly judged, that, notwithstanding this act of parliament, made in the strongest terms, for preservation of the protestant religion, that yet the king had, by his royal prerogative, a power to dispense with that law; and Sir Edward Hales was acquitted by the judges accordingly. So the king's dispensing power, being by the judges set up above the act of parliament, this law, which the people looked upon as their chief security against popery and arbitrary power, was by this judgment rendered altogether ineffectual. But this judgment is sufficiently exposed by Sir Edward Atkins,¹⁵ late one of the judges of the court of common pleas, in his enquiry into the king's power of dispensing with penal statutes; where it is shown, who it was that first invented dispensations; how they came into England; what ill use has been made of them there: and all this principally owing to the countenance given them by the judges. He says of the dispensing power,¹⁶ the pope was the inventor of it; our kings have borrowed it from

¹⁵ Sir Edward Atkin's Enquiry into the power of dispensing with penal statutes.

¹⁶ Postscript to the Enquiry, p. 51.

them; and the judges have from time to time nursed and dressed it up and given it countenance; and it is still upon the growth, and encroaching, till it has almost subverted all law, and made the regal power absolute, if not dissolute. This seems not only to show how far judges have been influenced by power, and how little cases of this sort, where the prerogative has been in question in former reigns, are to be relied upon for law: but I think it plainly shows too, that a man may use a greater freedom with the power of his sovereign and the judges in Great Britain, than it seems he may with the power of a governor in the plantations, who is but a fellow subject. Are these words with which we are charged, like these? Do Mr. Zenger's papers contain any such freedoms with his governor or his council, as Sir Edward Atkins has taken, with the regal power and the judges in England? And yet I never heard of any information brought against him for these freedoms.

If then, upon the whole, there is so great an uncertainty among judges, learned and great men, in matters of this kind; if power has had so great an influence on judges, how cautious ought we to be in determining by their judgments, especially in the plantations, and in the case of libels? There is heresy in law as well as in religion, and both have changed very much; and we well know that it is not two centuries ago that a man would have been burnt as an heretic for owning such opinions in matters of religion, as are publicly written and printed at this day. They are fallible men, it seems, and we take liberty not only to differ from them in religious opinions, but to condemn them and their opinions too; and I must presume, that in taking these freedoms in thinking and speaking about matters of faith or religion, we are in the right: for though it is said there are very great liberties of this kind taken in New York, yet I have heard of no information preferred by Mr. Attorney for any offences of this sort. From which I think it is pretty clear, that in New York, a man may make very free with his God, but he must take special care what he says of his governor. It is agreed upon by all men, that this is

a reign of liberty; and while men keep within the bounds of truth, I hope they may with safety both speak and write their sentiments of the conduct of men in power; I mean of that part of their conduct only which affects the liberty or property of the people under their administration; were this to be denied, then the next step may make them slaves; for what notions can be entertained of slavery, beyond that of suffering the greatest injuries and oppressions, without the liberty of complaining; or if they do, to be destroyed, body and estate, for so doing?

It is said and insisted on by Mr. Attorney, that government is a sacred thing; that it is to be supported and revered; it is government that protects our persons and estates; that prevents treasons, murders, robberies, riots, and all the train of evils that overturns kingdoms and states, and ruins particular persons; and if those in the administration, especially the supreme magistrate, must have all their conduct censured by private men, government cannot subsist. This is called a licentiousness not to be tolerated. It is said that it brings the rulers of the people into contempt, and their authority not to be regarded, and so in the end the laws cannot be put in execution. These I say, and such as these, are the general topics insisted upon by men in power, and their advocates. But I wish it might be considered at the same time, how often it has happened, that the abuse of power has been the primary cause of these evils, and that it was the injustice and oppression of these great men, which has commonly brought them into contempt with the people. The craft and art of such men is great, and who that is the least acquainted with history or law can be ignorant of the specious pretences which have often been made use of by men in power, to introduce arbitrary rule, and destroy the liberties of a free people. I will give two instances; and as they are authorities not to be denied, nor can be misunderstood, I presume they will be sufficient.

The first is a statute of Henry VII, the preamble of which will prove all, and more than I have alleged. It begins, "the king our sovereign lord remembereth how by unlawful

maintenances, giving of liveries, signs and tokens, &c., untrue demeanings of sheriffs in making of panels and other untrue returns, by taking of money, by injuries, by great riots and unlawful assemblies: the policy and good rule of this realm is almost subdued; and for the not punishing these inconveniences, and by occasion of the premises, little or nothing may be found by inquiry, &c., to the increase of murders, &c., and unsurities of all men living, and losses of their lands and goods."¹⁷ Here is a fine and specious pretence for introducing the remedy, as it is called, which is provided by this act, that is: instead of being lawfully accused by twenty-four good and lawful men of the neighborhood, and afterwards tried by twelve like lawful men, here is a power given to the lord chancellor, lord treasurer, the keeper of the king's privy seal, or two of them, calling to them a bishop, a temporal lord, and other great men mentioned in the act, (who, it is to be observed, were all to be dependants on the court) to receive information against any person for any of the misbehaviors recited in that act, and by their discretion to examine and to punish them according to their demerit.

The second statute I proposed to mention, is a subsequent act of the same king, the preamble of which has the like fair pretences as the former; for the king calling to his remembrance the good laws made against the receiving of liveries, &c., unlawful extortions, maintenances, embracery, &c., unlawful games, &c., and many other great enormities and offenses committed against many good statutes, to the displeasure of Almighty God, which, the act says, could not, nor yet can, be conveniently punished by the due order of the law, except it were first found by twelve men, &c., which for the causes aforesaid, will not find nor yet present the truth. And therefore the same statute directs that the justices of assize and justices of the peace shall, upon information for the king before them made, have full power, by their discretion, to hear and determine all such offenses.¹⁸

¹⁷ Statute of 3 Henry VII, chap. 1.

¹⁸ Statute of 11 Henry VII, chap. 3.

Here are two statutes that are allowed to have given the deepest wound to the liberties of the people of England, of any that I remember to have been made, unless it may be said that the statute made in the time of Henry VIII, by which his proclamations were to have the effect of laws, might in its consequence be worse. And yet we see the plausible pretences found out by the great men to procure these acts. And it may justly be said, that by those pretences the people of England were cheated or awed into the delivering up their ancient and sacred rights of trials by grand and petit juries. I hope to be excused for this expression, seeing my lord Coke calls it an unjust and strange act, that tended in its execution to the great displeasure of Almighty God, and the utter subversion of the common law.

These, I think, make out what I alleged, and are flagrant instances of the influence of men in power, even upon the representatives of a whole kingdom. From all which I hope it will be agreed, that it is a duty which all good men owe to their country, to guard against the unhappy influence of ill men when intrusted with power, and especially against their creatures and dependants, who, as they are generally more necessitous, are surely more covetous and cruel. But it is worthy of observation, that though the spirit of liberty was borne down and oppressed in England at that time, yet it was not lost; for the parliament laid hold of the first opportunity to free the subjects from the many insufferable oppressions and outrages committed upon their persons and estates by color of these acts, the last of which being deemed the most grievous, was repealed in the first year of Henry VIII. Though it is to be observed, that Henry VII and his creatures reaped such great advantages by the grievous oppressions and exactions, grinding the faces of the poor subjects, as my lord Coke says, by color of this statute by information only, that a repeal of this act could never be obtained during the life of that prince. The other statute, being the favorite law for supporting arbitrary power, was continued much longer. The execution of it was by the great men of the realm; and how they executed it, the sense

of the kingdom, expressed in the statute of the 17th of Charles I (by which the court of star chamber, the soil where informations grew rankest was abolished) will best declare. In that statute Magna Charta and the other statutes made in the time of Edward III, which, I think, are no less than five, are particularly enumerated as acts, by which the liberties and privileges of the people of England were secured to them, against such oppressive courts as the star chamber and others of the like jurisdiction. And the reason assigned for their pulling down the star chamber is, "that the proceedings, censures and decrees of the court of star chamber, even though the great men of the realm, nay, and a bishop too (holy man) were judges, had by experience been found to be an intolerable burthen to the subject, and the means to introduce an arbitrary power and government." And therefore, that court was taken away, with all the other courts in that statute mentioned, having like jurisdiction.

I do not mention this statute, as if, by the taking away the court of star chamber, the remedy for many of the abuses or offenses censured there was likewise taken away; no, I only intend by it to show that the people of England saw clearly the danger of trusting their liberties and properties to be tried, even by the greatest men in the kingdom, without the judgment of a jury of their equals. They had felt the terrible effects of leaving it to the judgment of these great men to say what was scandalous and seditious, false or ironical. And if the parliament of England thought this power of judging was too great to be trusted with men of the first rank in the kingdom, without the aid of a jury, how sacred soever their characters might be, and therefore restored to the people their original right of trial by juries, I hope to be excused for insisting, that by the judgment of a parliament, from whence no appeal lies, the jury are the proper judges of what is false, at least, if not of what is scandalous and seditious. This is an authority not to be denied; it is as plain as it is great; and, to say that this act indeed did restore to the people trial by juries, which was

not the practice of the star chamber, but that it did not give the jurors any new authority, or any right to try matters of law; I say this objection will not avail; for I must insist, that where matter of law is complicated with matter of fact, the jury have a right to determine both. As for instance, upon indictment for murder, the jury may, and almost constantly do, take upon them to judge whether the evidence will amount to murder or manslaughter, and find accordingly; and I must say I cannot see why in our case the jury have not at least as good a right to say, whether our newspapers are a libel or no libel, as another jury has to say, whether killing of a man is murder or manslaughter.

The right of the jury to find such a verdict as they in their conscience do think is agreeable to their evidence, is supported by the authority of Bushel's case, Vaughan's Reports, p. 135, beyond any doubt. For, in the argument of that case, the chief justice, who delivered the opinion of the court, lays it down for law,¹⁹ "That in all general issues, as upon *non cul.* in trespass, *non tort*, *nul disseisin* in assize, &c., though it is matter of law, whether the defendant is a trespasser, a disseiser, &c., in the particular cases in issue, yet the jury find not (as in a special verdict) the fact of every case, leaving the law to the court; but find for the plaintiff or defendant upon the issue to be tried, wherein they resolve both law and fact complicately." It appears by the same case, that though the discreet and lawful assistance of the judge, by way of advice to the jury, may be useful; yet that advice or direction ought always to be upon supposition, and not positive, and upon coercion. The reason given in the same book is, "because the judge as judge cannot know what the evidence is which the jury have; that is he can only know the evidence given in court; but the evidence which the jury have may be of their own knowledge, as they are returned of the neighborhood. They may also know from their own knowledge, that what is sworn in court is not true; and they may know the witnesses to be

¹⁹ Vaughan's Reports, 150.

stigmatized, to which the court may be strangers." But what speaks most to my purpose is that suppose the court did really know all the evidence the jury know, yet in that case it is agreed, "that the judge and jury may differ in the result of their evidence as well as two judges may," which often happens. And the judge subjoins the reason, why it is no crime for a jury to differ in opinion from the court, where he says, "That a man cannot see with another's eye, nor hear by another's ear; no more can a man conclude or infer the thing by another's understanding or reasoning." From all which I insist it is very plain, "that the jury are by law at liberty (without any affront to the judgment of the court) to find both the law and the fact, in our case," as they did in the case I am speaking to, which I will beg leave just to mention, and it was this. Mr. Penn and Mead being Quakers, and having met in a peaceable manner, after being shut out of their meetinghouse, preached in Gracechurch street, in London, to the people of their own persuasion, and for this they were indicted; and it was said, "that they with other persons, to the number of three hundred, unlawfully and tumultuously assembled, to the disturbance of the peace," &c. To which they pleaded, not guilty. And the petit jury being sworn to try the issue between the king and the prisoners, that is, whether they were guilty according to the form of the indictment; here there was no dispute but they were assembled together, to the number mentioned in the indictment; but, "whether that meeting together was riotously, tumultuously, and to the disturbance of the peace, was the question." And the court told the jury it was, and ordered the jury to find it so: "For," said the court, "the meeting was the matter of fact, and that is confessed, and we tell you it is unlawful, for it is against the statute; and the meeting being unlawful, it follows of course that it was tumultuous, and to the disturbance of the peace." But the jury did not think fit to take the court's word for it; for they could neither find riot, tumult, or any thing tending to the breach of the peace, committed at that meeting; and they acquitted Mr. Penn and Mead. In doing of which

they took upon them to judge both the law and the fact; at which the court (being themselves true courtiers) were so much offended, that they fined the jury forty marks apiece, and committed them till paid. But Mr. Bushel, who valued the right of a jurymen and the liberty of his country more than his own, refused to pay the fine; and was resolved (though at a great expense and trouble too) to bring, and did bring, his *habeas corpus*, to be relieved from his fine and imprisonment, and he was released accordingly; and this being the judgment in his case, it is established for law, "that the judges, how great soever they be, have no right to fine, imprison, or punish a jury, for not finding a verdict according to the direction of the court." And this I hope is sufficient to prove, that jurymen are to see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings, in judging of the lives, liberties or estates of their fellow-subjects. And so I have done with this point.

This is the second information for libeling of a governor that I have known in America; and the first, though it may look like a romance, yet, as it is true, I will beg leave to mention it. Governor Nicholson, who happened to be offended with one of his clergy, met him one day upon the road, and, as was usual with him, under the protection of his commission, used the parson with the worst of language, threatened to cut off his ears, slit his nose, and at last to shoot him through the head. The parson, being a reverend man, continued all this time uncovered in the heat of the sun, until he found an opportunity to fly for it; and coming to a neighbor's house, felt himself very ill of a fever, and immediately writes for a doctor; and, that his physician might be the better judge of his distemper, he acquainted him with the usage he had received; concluding, that the governor was certainly mad, for that no man in his senses would have behaved in that manner. The doctor unhappily shows the parson's letter; the governor came to hear of it; and so an information was preferred against the poor man for saying he believed the governor was mad; and it was

laid in the information to be false, scandalous and wicked, and wrote with intent to move sedition among the people, and bring his excellency into contempt. But, by an order from the late queen Anne, there was a stop put to that prosecution, with sundry others set on foot by the same governor, against gentlemen of the greatest worth and honor in that government.

And may I not be allowed, after all this, to say, that by a little countenance, almost any thing which a man writes, may, with the help of that useful term of art called an innuendo, be construed to be a libel, according to Mr. Attorney's definition of it; that whether the words are spoke of a person of a public character, or of a private man, whether dead or living, good or bad, true or false, all make a libel; for, according to Mr. Attorney, after a man hears a writing read, or reads and repeats it, or laughs at it, they are all punishable. It is true, Mr. Attorney is so good as to allow, after the party knows it to be a libel; but he is not so kind as to take the man's word for it.

If a libel is understood in the large and unlimited sense urged by Mr. Attorney, there is scarce a writing I know that may not be called a libel, or scarce any person safe from being called to an account as a libeler: for Moses, meek as he was, libeled Cain; and who is it that has not libeled the devil? For, according to Mr. Attorney, it is no justification to say one has a bad name. Echard has libeled our good king William. Burnet has libeled, among many others, king Charles and king James, and Rapin has libeled them all. How must a man speak or write, or what must he hear, read or sing, or when must he laugh, so as to be secure from being taken up as a libeler? I sincerely believe that were some persons to go through the streets of New York now-a-days, and read a part of the Bible, if it was not known to be such, Mr. Attorney, with the help of his innuendoes, would easily turn it into a libel. As, for instance, the sixteenth verse of the ninth chapter of Isaiah, "The leaders of the people cause them to err, and they that are led by them are destroyed." But should Mr. Attorney go about to

make this a libel, he would read it thus: "The leaders of the people (innuendo, the governor and council of New York) cause them (innuendo, the people of this province) to err, and they (the people of this province meaning) are destroyed (innuendo, are deceived into the loss of their liberty) which is the worst kind of destruction. Or if some person should publicly repeat, in a manner not pleasing to his betters, the tenth and eleventh verses of the fifty-fifth chapter of the same book, there Mr. Attorney would have a large field to display his skill, in the artful application of his innuendoes. The words are, "His watchmen are all blind, they are ignorant; yea, they are greedy dogs, that can never have enough." But to make them a libel, there is, according to Mr. Attorney's doctrine, no more wanting but the aid of his skill in the right adapting his innuendoes. As, for instance, "His watchmen (innuendo, the governor's council and assembly) are blind, they are ignorant (innuendo, will not see the dangerous designs of his excellency); yea, they (the governor and council meaning) are greedy dogs, which can never have enough (innuendo, enough of riches and power).

Such an instance as this seems only fit to be laughed at; but I may appeal to Mr. Attorney himself, whether these are not at least equally proper to be applied to his excellency and his ministers, as some of the inferences and innuendoes in his information against my client. Then if Mr. Attorney is at liberty to come into court, and file an information in the king's name, without leave, who is secure, whom he is pleased to prosecute as a libeler? And as the crown law is contended for in bad times, there is no remedy for the greatest oppression of this sort, even though the party prosecuted is acquitted with honor. And give me leave to say, as great men as any in Britain have boldly asserted, that the mode of prosecuting by information, when a grand jury will not find a bill of indictment, is a national grievance, and greatly inconsistent with that freedom, which the subjects of England enjoy in most other cases. But if we are so unhappy as not to be able to ward off this stroke

of power directly, yet let us take care not to be cheated out of our liberties, by forms and appearances; let us always be sure that the charge in the information is made out clearly, even beyond a doubt; for though matters in the information may be called form, upon trial, yet they may be, and often have been found to be matters of substance upon giving judgment.

Gentlemen, the danger is great in proportion to the mischief that may happen, through our too great credulity. A proper confidence in a court is commendable; but as the verdict (whatever it is) will be yours, you ought to refer no part of your duty to the discretion of other persons. If you should be of opinion that there is no falsehood in Mr. Zenger's papers, you will, nay (pardon me for the expression) you ought to say so; because you do not know whether others (I mean the court) may be of that opinion. It is your right to do so, and there is much depending upon your resolution, as well as upon your integrity.

The loss of liberty to a generous mind is worse than death; and yet we know there have been those in all ages, who for the sake of preferment, or some imaginary honor, have freely lent a helping hand to oppress, nay to destroy their country. This brings to my mind that saying of the immortal Brutus, when he looked upon the creatures of Caesar, who were very great men, but by no means good men. "You Romans," said Brutus, "if yet I may call you so, consider what you are doing; remember that you are assisting Caesar to forge those very chains, which one day he will make yourselves wear." This is what every man that values freedom, ought to consider: he should act by judgment, and not by affection or self-interest; for, where these prevail, no ties of either country or kindred are regarded; as, upon the other hand, the man who loves his country prefers its liberty to all other considerations, well knowing that without liberty life is a misery.

A famous instance of this you will find in the history of another brave Roman of the same name, I mean Lucius Junius Brutus, whose story is well known, and therefore I

shall mention no more of it, than only to show the value he put upon the freedom of his country. After this great man, with his fellow citizens whom he had engaged in the cause, had banished Tarquin the proud, the last king of Rome, from a throne which he ascended by inhuman murders, and possessed by the most dreadful tyranny and proscriptions; and had by this means amassed incredible riches, even sufficient to bribe to his interest, many of the young nobility of Rome, to assist him in recovering the crown; but the plot being discovered, the principal conspirators were apprehended, among whom were two of the sons of Junius Brutus. It was absolutely necessary that some should be made examples of, to deter others from attempting the restoring of Tarquin and destroying the liberty of Rome. And to effect this it was, that Lucius Junius Brutus, one of the consuls of Rome, in the presence of the Roman people, sat as judge and condemned his own sons, as traitors to their country: and, to give the last proof of his exalted virtue and his love of liberty, he with a firmness of mind, (only becoming so great a man) caused their heads to be struck off in his own presence; and when he observed that his rigid virtue occasioned a sort of horror among the people, it is observed he only said, "My fellow citizens, do not think that this proceeds from any want of natural affection: no, the death of the sons of Brutus can affect Brutus only; but the loss of liberty will affect my country." Thus highly was liberty esteemed in those days,—that a father could sacrifice his sons to save his country! But why do I go to heathen Rome to bring instances of the love of liberty; the best blood in Britain has been shed in the cause of liberty; and the freedom we enjoy at this day may be said to be (in a great measure) owing to the glorious stand the famous Hampden, and other of our countrymen, made, against the arbitrary demands and illegal impositions of the times in which they lived; who, rather than give up the rights of Englishmen, and submit to pay an illegal tax, of no more, I think, than three shillings, resolved to undergo—and for the liberty of their country did undergo—the greatest ex-

tremities in that arbitrary and terrible court of star chamber, to whose arbitrary proceedings (it being composed of the principal men of the realm, and calculated to support arbitrary government) no bounds or limits could be set; nor could any other hand remove the evil, but a parliament.

Power may justly be compared to a great river, which, while kept within its due bounds, is both beautiful and useful; but when it overflows its banks it is then too impetuous to be stemmed, it bears down all before it, and brings destruction and desolation wherever it comes. If then this is the nature of power, let us at least do our duty, and like wise men (who value freedom) use our utmost care to support liberty, the only bulwark against lawless power, which in all ages has sacrificed to its wild lust and boundless ambition, the blood of the best men that ever lived.

I hope to be pardoned, sir, for my zeal upon this occasion; it is an old and wise caution, that when our neighbor's house is on fire, we ought to take care of our own. For, though, blessed be God, I live in a government where liberty is well understood and freely enjoyed, yet experience has shown us all (I am sure it has to me) that a bad precedent in one government is soon set up for an authority in another; and therefore I cannot but think it mine, and every honest man's duty, that (while we pay all due obedience to men in authority) we ought at the same time to be upon our guard against power, wherever we apprehend that it may affect ourselves or our fellow subjects.

I am truly very unequal to such an undertaking on many accounts. And you see I labor under the weight of many years, and am borne down with great infirmities of body; yet, old and weak as I am, I should think it my duty if required, to go to the utmost part of the land, where my service could be of any use in assisting to quench the flame of prosecutions upon informations, set on foot by the government, to deprive a people of the right of remonstrating, (and complaining too) of the arbitrary attempts of men in power. Men who injure and oppress the people under their administration provoke them to cry out and complain; and

then make that very complaint the foundation for new oppressions and prosecutions. I wish I could say there were no instances of this kind.

But to conclude; the question before the court and you, gentlemen of the jury, is not of small nor private concern, it is not the cause of a poor printer, nor of New York alone, which you are now trying: no! it may, in its consequences, affect every freeman that lives under a British government on the main of America. It is the best cause; it is the cause of liberty; and I make no doubt but your upright conduct, this day, will not only entitle you to the love and esteem of your fellow citizens; but every man who prefers freedom to a life of slavery, will bless and honour you, as men who have baffled the attempts of tyranny; and by an impartial and uncorrupt verdict, have laid a noble foundation for securing to ourselves, our posterity and our neighbors, that to which nature and the laws of our country have given us the right, the liberty both of exposing and opposing arbitrary power in these parts of the world, at least, by speaking and writing truth.

The Attorney-General observed that Mr. Hamilton had gone very much out of the way and had made himself and the people very merry; but that he had been citing cases not at all to the purpose. He said there was no such cause as Mr. Butler's or Sir Edward Hale's before the court; and he could not find out what the court or jury had to do with dispensations, riots or unlawful assemblies: all that the jury had to consider was Mr. Zengler's printing and publishing two scandalous libels which very highly reflected on his excellency and the principal men concerned in the administration of this government which is confessed. That is the printing and publishing of the journals set forth in the information is confessed. As Mr. Hamilton had confessed the printing and there could be no doubt but that they were scandalous papers, highly reflecting upon his excellency and the principal magistrates in the province; he made no doubt but the jury would find the defendant guilty and would refer to the court for their direction.

THE CHIEF JUSTICE. Gentlemen of the jury: The great pains Mr. Hamilton has taken to show how little regard juries are to pay to the opinion of the judges; and his insisting so much upon the conduct of some judges in trial of this kind, is done no doubt with a design that you should take very little notice of what I may say upon this occasion. I shall therefore only observe to you that as the facts or words in the information are confessed, the only

thing that can come in question before you is, whether the words as set forth in the information make a libel. And that is a matter of law no doubt and which you may leave to the court. But I shall trouble you no further with anything more of my own but read to you the words of a learned and upright judge in a case of the like nature.

"To say that corrupt officers are appointed to administer affairs is certainly a reflection on the government. If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist; for it is very necessary for all governments that the people should have a good opinion of it. And nothing can be worse to any government than to endeavor to procure animosities; as to the management of them this has been always looked upon as a crime and no government can be safe without it be punished."

Now you are to consider whether these words I have read to you do not tend to beget an ill-opinion of the administration of the government? To tell us those who are employed know nothing of the matter and those who do know are not employed; men are not adapted to offices but offices to men, out of a particular regard to their interest and not to their fitness for the places; this is the purport of these papers.

Mr. Hamilton: I humbly beg your honor's pardon; I am very much misapprehended if you suppose that what I said was so designed. Sir, you know I made an apology for the freedom I found myself under a necessity of using upon this occasion. I said there was nothing personal designed, it arose from the nature of our defence.

THE VERDICT.

The *jury* withdrew and in a short time returned and being asked by the *clerk* "whether they were agreed of their verdict and whether John Peter Zenger was guilty of printing and publishing the libels in the information mentioned?" They answered by Thomas Hunt, their foreman,—*Not Guilty.*

THE TRIAL OF HARRY CROSSWELL FOR LIBEL, HUDSON, NEW YORK, 1803

THE NARRATIVE.

Almost seventy years went by and the old printer, John Peter Zenger, had long been gathered to his fathers, when another and a greater Hamilton scored another victory for the Freedom of the Press, after a speech to a hostile bench of judges, that was to go down in the history of our country as his last and his greatest one.

Again it was a New York printer who was in the toils of the law and again it was charges against persons in high places that brought about the prosecution. In his newspaper, *The Wasp*, Harry Crosswell had stated that a notorious scribbler named Callender¹ had been paid by President Jefferson for calling George Washington a traitor, a robber and perjurer and John Adams a hoary-headed incendiary. And for this he was indicted for libel. At the trial, the judge ruled that it would do the prisoner no good that Callender admitted it all, because the truth of the charge was no defense to a criminal libel. And he told the jury that all they had to do was to decide whether Crosswell had printed these things, for it was for the court alone and not for them to say whether the article was a libel.

This doctrine, as the other Hamilton had done in the Zenger trial, Alexander Hamilton combatted in a great speech, maintaining that the question "libel or no libel" was for the jury. And though the jury, following the instructions of the court, found a verdict of guilty, yet his powerful argument made so great an impression on the judges that they were unable to agree and Crosswell went free.

¹ See 10 Am. St. Tr. 813.

THE TRIAL.²

In the Supreme Court, Hudson, New York, July, 1803.

HON. MORGAN LEWIS,³ *Chief Justice.*

July 15.

The grand jury of the General Sessions of the Peace of Columbia county had previously returned an indictment against Harry Crosswell of the City of Hudson, Columbia County, New York, for libel. It charged that he as printer and publisher of a newspaper called the *Wasp* had on September 9 in said city and in said newspaper the following "scandalous, malicious and seditious" libel concerning Thomas Jefferson, President of the United States:

"Jefferson paid Callender for calling Washington a traitor, a robber and a perjurer; for calling Adams a hoary-headed incendiary; and for most grossly slandering the private characters of those who he well knew were virtuous."

The innuendos stated that Jefferson referred to President Thomas Jefferson,⁴ Washington to George Washington,⁵ and

² *Bibliography.* "Reports of Cases adjudged in the Supreme Court of Judicature of the State of New York, by William Johnson. With notes and references by Lorenzo B. Shepard. Vol. III. Banks, Gould & Co., New York, 1849."

"Parker's Criminal Reports."

"The Speeches at full length of Mr. Van Ness, Mr. Caines, The Attorney General, Mr. Harrison and General Hamilton in the Great Cause of the People against Harry Crosswell, on an Indictment for Libel on Thomas Jefferson, President of the United States. New York. Printed by G. & R. Waite, No. 64 Maiden Lane. 1804."

³ LEWIS, MORGAN (1754-1854). Born New York City; Member N. Y. Legislature, 1808-1811; Brigadier (and afterwards Major) General 1812; Judge Supreme Court, N. Y. 1792; Chief Justice, 1801; Governor 1804-1807. President N. Y. Hist. Soc. 1835. Died in New York City.

⁴ JEFFERSON, THOMAS (1743-1826). Born Shadwell, Va. Grad. William and Mary Coll., Va.; Member House of Burgesses Va., 1769; Delegate to Constitutional Congress, 1775-1777; 1783-1785; Va. Assembly, 1777; Governor of Va., 1779; Member of Congress, 1780; Minister to France, 1785-1789; Secretary of State, 1789-1794; Vice President United States, 1797-1801; President, 1801-1809.

⁵ WASHINGTON, GEORGE (1732-1799). Born Westmoreland Co. Va.; Member House of Burgesses, 1759-1774; Del. to Continental

Adams to John Adams,⁶ both former Presidents of the United States.

The case having been removed by certiorari from the Sessions of the Peace to the Supreme Court and the defendant having pleaded *Not Guilty* the trial began today.

Ambrose Spencer,⁷ Attorney General, and *George Caines*⁸ for the People;

Alexander Hamilton,⁹ *Richard Harrison*¹⁰ and *William P. Van Ness*¹¹ for the Defendant.

Congress, 1774; Commander-in-Chief American Army; Member Constitutional Convention, 1787; First President of the United States, 1789-1797.

⁶ See 7 Am. St. Tr. 811; 10 Id. 421.

⁷ See 1 Am. St. Tr. 789.

⁸ See 2 Am. St. Tr. 902.

⁹ See 1 Am. St. Tr. 6.

¹⁰ See 1 Am. St. Tr. 4.

¹¹ VAN NESS, WILLIAM PETER (1778-1826). Born Ghent, N. Y. Grad. Columbia Coll. 1797; Practiced law in New York City, and was Burr's second in his duel with Hamilton; U. S. District Judge, South. Dist., N. Y. 1812. Died in New York City. Author of "An Examination of the Charges Against Aaron Burr," "Laws of New York, with Notes," "Jackson's First Invasion of Florida." Speaking of the grounds of the Van Buren House at Kinderhook, the History of Columbia County, N. Y., I. 440, says: "On a fenced-in monument of modest proportions, covered with moss and lichen, is a faded inscription reciting that Peter Van Ness, who is buried there at the side of his wife, had served as an officer in the French war, was in command of a regiment at the capture of Burgoyne in 1777, was a member of the State convention that adopted the Federal Constitution, was elected State senator, and was the first judge of Columbia county. He had three sons, all of whom became prominent in public life: John P. Van Ness, member of congress and mayor of Washington; William P. Van Ness, who studied law with Aaron Burr and was appointed judge of the United States District Court for the Southern District of New York by President Madison; and Cornelius P. Van Ness, who became Chief Justice of the Supreme Court of Vermont, governor of that State, collector of the port of New York, and minister to Spain. Peter Van Ness died at Lindenwald in 1804, a year rendered memorable by the Burr-Hamilton duel. The second of his distinguished sons, William P. Van Ness, who had read law in the office of Aaron Burr, with whom Martin Van Buren finished his legal course, was the founder of Lindenwald."

The Defendant's Counsel moved for a continuance in order to obtain the testimony of a material witness, James Thompson Callender of the State of Virginia. The defendant made affidavit that he would prove by him the truth of the charge set forth in the indictment; that he would establish that this witness wrote a pamphlet called *The Prospect Before Us*, in which were set out the very charges contained in this indictment, and that Thomas Jefferson had paid him, Callender, two sums of fifty dollars each to assist him in this publication and that the witness would bring with him two letters from Thomas Jefferson to him showing his approval of said pamphlet.

THE CHIEF JUSTICE refused the continuance, because in his opinion the truth cannot be given in evidence in a criminal prosecution for libel.

THE EVIDENCE.

The *witnesses* for the Prosecution testified that the defendant was the editor of a newspaper published in the city of Hudson, called the *Wasp*, that in the issue No. 7 of the date mentioned in the indictment the matter charged there was printed with the following introduction: "Holt says the burden of the Federal song is that Mr. Jefferson paid Callender for writing against the late administration. This is wholly false. The charge is explicitly this," and the following conclusion: "These charges not a Democratic editor has yet dared to meet in an open and manly discussion."

The *witnesses* also testified to buying No. 7 and other issues of the *Wasp* at the office where they were printed, some of them being sold by the defendant and some by a journeyman in the office.

Another *witness* stated that he understood the epithets, Jefferson, Washington and Adams to be as stated in the innuendoes in the indictment. The *Attorney-General* read over the objections of the Defendant passages from No. 1 and another piece from No. 7 of the *Wasp*, in neither of which passages was there anything alleged against Thomas Jefferson in his private or official capacity.

The *Defendant* offered to prove that he had no agency in devising, writing or inditing the publication in question and that the same was handed to be printed to a person in his employ and in his absence without his knowledge.

THE CHIEF JUSTICE refused unless the defendant could also prove that he was not privy to the printing and publication of the alleged libel.

After argument to the Jury by *Counsel* on both sides:

CHIEF JUSTICE LEWIS charged the Jury that the rule of law which confined jurors to the consideration of facts alone was strictly applicable to the case of libels where the question of libel or no libel

was an inference of law from the facts; and that it was perhaps the only case in which courts invariably regarded a general as a special verdict; and where they would, *ex mero moto*, arrest the judgment if the law was with the defendant.

He then read to the jury the opinion of Lord Mansfield in the case of *The Dean of St. Asaph* (3 Term Rep. 428) and charged them that the law therein laid down was the law of this state; that it was no part of the province of a jury to inquire or decide on the intent of the defendant, or whether the publication in question was true or false or malicious; that the only questions for their consideration and decision were, first, whether the defendant was the publisher of the piece charged in the indictment; and second as to the truth of the innuendoes; that if they were satisfied as to these two points, it was their duty to find him guilty; that the intent of the publisher and whether the publication in question was libelous or not was upon the return of the *postea* to be decided exclusively by the court, and therefore it was not his duty to give any opinion to them on these points; and accordingly no opinion was given.

The *Jury* found a verdict of *Guilty*.

February 13, 1804.

The Defendant's Counsel moved for a new trial. In addition to the CHIEF JUSTICE, HON. JAMES KENT,¹² BROCKHOLST LIVINGSTON,¹³ and SMITH THOMPSON,¹⁴ heard the arguments.

Mr. Van Ness: The cause should have been put off to enable the defendant to procure testimony to prove the truth of the libel. The law allows the defendant upon an indictment for a libel to give in evidence the truth as explanatory of his intent. This was the rule of the common law and it has never since been repealed or altered by any competent authority. The ancient statutes *De Scandal*, made the falsity of the charge a material ingredient

¹² KENT, JAMES (1763-1847). Born Phillipi, Putnam Co., N. Y. Grad. Yale, 1781; Began practice of law at Poughkeepsie, 1785; Member State Legislature, 1790-1794; Removed to New York City, 1794; Professor of Law Columbia Coll., 1796; Recorder New York City, 1797; Judge Supreme Court, 1798; Chief Justice, 1804; Chancellor, 1814; Professor of Law Columbia Coll., 1823; Member State Const. Conv., 1822. His lectures on law grew into his celebrated Commentaries (1826). Died in N. Y. City.

¹³ See 1 Am. St. Tr. 6.

¹⁴ THOMPSON, SMITH (1767-1843). Born Stanford, N. Y. District Atty., N. Y., 1801; Judge Supreme Court, 1802-1814; Chief Justice, 1814-1818; Secretary of the Navy, 1818-1823; Associate Justice Supreme Court of the United States, 1823-1843. Died in Poughkeepsie.

in the crime. These statutes have been considered by Lord Coke and others, as declaratory of the common law; and prosecutions for libels even down to the period of the establishment of the court of Star Chamber were founded upon these statutes. The form of the ancient precedents was agreeable to this doctrine and made the essence of the crime consistent with the falsehood; and precedents are the best evidence of the common law. There is a form of the record of a conviction in 3, Inst. 174 which grounds the charge on its falsity, *quia litera continent in se nullum veritatem*; and indictments continued until very lately to use the epithet *false* as a substantive description of a libel. There is not a trace of the contrary position to be met with in the simplicity of ancient times. The opposite doctrine which mentions that a writing is equally libelous whether true or false, originated in a polluted source, the despotic tribunal of the Star Chamber. The decision in Coke was evidently extrajudicial and so it has been considered by Mr. Barrington in his *Observations on the Statutes*. The court of Star Chamber acted without the aid of a jury and introduced violent and oppressive principles. But notwithstanding the sanction of that court, Lord Coke when attorney-general, maintained the old common law doctrine, and in the trial of the Seven Bishops, Mr. J. Powell, who according to Lord Camden was the only honest man upon the bench, charged the jury that to maintain a prosecution for a libel it must appear to be false, malicious and tending to sedition. The Star Chamber had no authority to alter the common law. Our ancestors when they emigrated to this country, brought with them the common law as their inheritance and birth-right; and one of the earliest acts of our colonial legislature was to assert their claim to the enjoyment of the common law. The decision in Zenger's case in 1735 was of no great authority. The times were then violent; no great research or temper was displayed on that occasion by the court and the decision was reprobated by the public. The act of congress, commonly called the sedition act, was expressly declaratory, in that part of it which allowed the truth to be given in evidence and was a high authority of the sense of the nation as to the antecedent law. The doctrine which will be contended for on the other side, that the truth cannot be given in evidence and is in no case to justify a libel, although it should be promulgated with the purest motives, is repugnant to the first principles of policy and justice and contrary to the genius of a free, representative republic. Freedom of discussion and a freedom of the press under the guidance and sanction of truth are essential to the liberties of our country and to enable the people to select their rulers with discretion and to judge correctly of their merits.

The Chief Justice misdirected the jury in saying they had no right to judge of the intent and of the law. In criminal cases the defendant does not spread upon the records the merits of the defense, but consolidates the whole in the plea of not guilty. This plea embraces the whole matter of law and fact involved in the

charge and the jury have an undoubted right to give a general verdict which decides both the law and the fact. The verdict is final and cannot be questioned by the court and they were never responsible for it by *attaint*, which would not lie in a criminal case. The maxim that *ad questionem juris non respondent juratores* applies to cases where the facts are contained in the record and completely separated from the law. All the cases agree that the jury have the power to decide the law as well as the fact, and if the law gives them the power it gives them the right also. Power and right are convertible terms when the law authorizes the doing of an act which shall be final and for the doing of which the agent is not responsible.

The intent constitutes crime. To deny then to the jury the right to judge of the intent and yet to require them to find a general verdict of guilty is requiring them to commit perjury. The particular intent constitutes the crime in cases of libel, because the act is not of itself unlawful; and where the particular intent alone constitutes the guilt the court cannot judge of that intent and the jury must find it. The time and circumstances are very material in cases of libel. To say the king had a cold when the pretender had just landed in Scotland was held punishable in England. So to have propagated a report in December, 1776, that General Washington was dead, might have deserved punishment; but to have said so in the year 1785 would have been harmless, at least in a legal view.

It is admitted to be the duty of the court to direct the jury as to the law and it is advisable for the jury in most cases, to receive the law from the court; and in all cases they ought to pay respectful attention to the opinion of the court. But it is also their duty to exercise their judgments upon the law as well as the fact; and if they have a clear conviction that the law is different from what it is stated to be by the court, the jury are bound in such cases by the superior obligations of conscience, to follow their own convictions. It is essential to the security of personal rights and public liberty that the jury should have and exercise the power to judge both of the law and of the criminal intent. After a general verdict of guilty, relief as to the question of intent cannot be granted to a defendant by motion in arrest of judgment, or by writ of error, because the court can judge only from what appears upon the record itself, and the context is not spread upon the record. The prosecutor selects such parts only of the libelous publication as he deems material and the whole context is allowed to be read to the jury at the trial, but without any kind of meaning or use if the jury are not to judge of the intent. The court and jury at the circuit proceed, therefore, upon one publication and the court above upon another.

Before Franklin's Case in the time of Lord Raymond the courts never laid it down as a rule that the jury were not to judge of the criminal intent. In 1 Leon. 287, an indictment that did not find the criminal intent was held bad. In Bushell's Case it was decided that on the plea of not guilty the jury by a general verdict determined

the whole complicated question of law and fact; and the same doctrine was advanced by two of the judges upon the trial of the Seven Bishops. During the existence of the licensing acts the judge used to charge the jury as to the publication only, for the intent was not material; and afterwards when the licensing acts finally expired under William III this rule was found convenient to extend to newspaper publications. The law as laid down in Franklin's Case has since been carried to a rigorous and alarming extent by Lord Mansfield. But in Woodfall's Case the jury fairly met the new doctrine and found all that they were directed or permitted to find, to wit, that the defendant was guilty of printing and publishing only, and yet the court dared not to act upon such a finding. They deny to the jury any cognizance of the intent and yet they require of them a general unconditional verdict which embraces that intent. In Took's Case as reported by the accurate Mr. Hargrave, Lord Mansfield acted however in opposition to his former practice and left to the jury the whole matter in issue, including the law, the fact and the criminal intent; and it appears from their speeches in the Parliamentary Register that Lord Camden and Lord Loughborough always held and laid down as judges, a doctrine different from Lord Mansfield in relation to the rights of the jury. The English declaratory act of 1793 put this question at rest in England; and that decision is entitled to the greatest respect as the question had long been discussed and had exercised the learning and researches of the first lawyers in the nation.

The declaratory act of Congress which has been already mentioned and the opinion of the Supreme Court of the United States, as delivered by Chief Justice Jay, are decisive authorities to show the general sense of this country in favor of the common law right of the jury to judge of the criminal intent and of the law as well as of the fact.

Mr. Caines: Had the witness been allowed to come from Virginia, he would have been of no consequence, because the law is well settled that on an indictment for a libel the truth cannot be given in evidence; and this rule of law rests upon the most solid grounds, notwithstanding the popular and captivating impression of the contrary doctrine.

A libel is punishable not because it is false but because of its evil tendency, its tendency to a breach of the peace. This tendency equally exists whether the libel be true or false. The malicious publication of truth will often affect to a most pernicious degree the harmony and happiness of society. A libel is correctly said to be more libelous for being true for it has an increased tendency to a breach of the peace. In a moral view the malicious relating of either truth or falsehood for the purpose of creating misery is equally reprehensible (Paley's Moral Philosophy, 237-238). The intent does not constitute the punishable nature of the libel for the reasons suggested. This doctrine is firmly supported by the uniform language of authorities; and it has been received for ages as a principle of the common law. It is no objection to the rule

that the earliest decisions which we meet with, expressly recognizing it, were Star Chamber decisions. The doctrine in *Twyne's case* and many of the most valuable and received principles in our law, had their origin in that court. It was not so much the arbitrary decisions of that court as its mode of proceeding, without trial by jury, that drew upon it the general odium of the nation. It is not correct as stated by the opposite counsel that in the ancient law the libel was founded upon the falsity of the charge. The Anglo-Saxon laws treated libellers with the most merciless severity by cutting out the offender's tongue. (2 Inst. 227) and Bracton (b. 3c. 36) goes to prove that in his time, falsity was not regarded as the essence of the libel. The inference attempted to be drawn from the statutes *De Scandal*, *Magnatum*, does not apply to libels at common law. Those statutes gave new and additional remedies; and that was the reason they allowed the truth to be given in evidence. *Fuller's Case* (5 St. Tr. 441) was a prosecution founded upon those statutes. If the ancient precedents used the epithet *false* it was merely a word of form and the more modern precedents have laid it aside. (7 Term Rep. 4.) The declaratory English statute of 1793 (if indeed it was declaratory) does not permit the truth to be given in evidence although the twelve judges in their opinion to the House of Lords, apprized the house that the settled law and practice was not to allow the truth to be given in evidence. The patriotism of the English nation has never considered this rule of law as hostile to their liberties; and in England it is admitted that personal rights and freedom of discussion are as well secured and protected as in any country. The law has wisely balanced between extremes upon this subject and has allowed all reasonable and useful freedom of inquiry, without granting the pernicious indulgence to traduce and blacken private reputation. A free discussion of public measures without descending to delineate private vices is sufficient for all beneficial purposes. To expose personal vices, defects and foibles to the public eye corrupts the morals of the community, tends to drive useful men from office and to render the press a vehicle to scatter firebrands, arrows and death.

The next ground upon which the motion is attempted to be supported is, that the chief-justice ruled that the jury had no right to judge of the intent, for that the intent was a question of law. The jury have undoubtedly the power in criminal cases to decide the law as well as the fact, if they will take upon themselves the exercise of it; but we must distinguish in this case between power and right. It is the right of the jury to decide the fact and only the fact; and it is the exclusive province of the court to decide the law in all cases, criminal as well as civil. A jury is wholly incompetent, and necessarily must be, from the nature of their institution, to decide questions of the law; and if they were invested with this right it would be attended with mischievous and fatal effects. The law instead of being a fixed rule, would become uncertain and capricious and there would not remain any stability or any uniformity of decision or certainty of principle in the administration

of justice. The reasoning of Lord Mansfield in the case of the Dean of St. Asaph (3 Term. Rep. 491) must work its way to the judgment and conviction of every person who reads it. It is eloquent, impressive and solid. Where an act becomes criminal by reason of a particular interest in that case, the jury must judge of the intent; but when the act is unlawful in itself independent of the motive, the jury have nothing to do with the *quo animo*. This is the case with libels. They are equally injurious to the public peace and all their deleterious effects follow whether the intent be criminal or not; therefore an inquiry into the intent becomes wholly immaterial. The facts are also all spread upon the record and this forms a peculiar and strong case for the exclusive determination of the court upon the construction and legal inferences arising upon the publication.

If the jury were to judge of the law in the case of libels, why not of the effect of the writings in civil cases and of the law in all cases where the plea is the general issue? Surely the counsel on the other side are not prepared to carry their doctrine to this extent.

The decision by Lord Raymond in Franklin's Case (9 St. Tr. 255) and the uniform stream of judicial decisions from that day to the present, have settled the law as it was laid down by the Chief Justice at the circuit. The opinions of the twelve judges delivered to the House of Lords in 1793 are an authority the most commanding and weighty, to show that the criminal intent is not of the essence of the libel and that the courts and not the jury are the rightful judges of all questions of law. And admitting that the English statute of that year to have been intended as declaratory, it cannot outweigh in point of authority and as matter of evidence on a question touching the common law, the clear, decided and uniform language of the courts.

The act of Congress of 1798 has not been considered as declaratory. It was stated in a report of a committee of the House of Representatives to be an amelioration of the common law. It could not have had reference to any antecedent common law, for the common law of England, in respect to criminal matters, was never adopted by the constitution of the United States.

The *Attorney-General* followed with an argument on behalf of the People and *Mr. Harrison* on behalf of the Defendant.

ALEXANDER HAMILTON FOR THE DEFENSE.

Mr. Hamilton. May it please the Court: In rising to address your Honors at so late a period of the day and after your attention has been so much fatigued and the

cause has been so ably handled, I may say, so exhausted, I feel a degree of embarrassment which it is with difficulty I can surmount. I fear lest it should not be possible for me to interest the attention of the Court on the subject on which I have to speak. Nevertheless I have a duty to perform of which I cannot acquit myself, but by its execution. I have however this consolation, that though I may fail in the attempt I shall be justified by the importance of the question. I feel that it is of the utmost magnitude, of the highest importance viewed in every light. First as it regards the character of the head of our nation; for if indeed the truth can be given in evidence, and that truth can, as stated in the indictment, be established it will be a serious truth, the effect of which it will be impossible to foresee. It is important, also, as it regards the boundaries of power between the constituent parts of our constitutional tribunals to which we are, for the law and the fact to resort, our judges and our juries. It is important as it regards settling the right principles that may be applied to the case in giving to either the one or the other the authority destined to it by the spirit and letter of our law. It is important on account of the influence it must have on the rights of our citizens. Viewing it therefore in these lights, I hope I shall, in the arduous attempt, be supported by its importance, and if any doubt hangs on the mind of the Court I shall, I trust, be able to satisfy them that a new trial ought to be had.

The question branches itself into two divisions. The first as to the truth. Whether under a general issue of not guilty, it ought to be given in evidence. The other as to the power of the Court, whether it has a right exclusively over the intent, or whether that and the law do not constitute one complicated fact for the cognizance of the Jury under the direction of the Judge. The last I trust, can be made to appear on the principles of our jurisprudence as plainly as it is possible to evince anything to a Court; and that in fact there are no precedents which embrace the doctrines of the other side, or rather that they are so

diverse and contrariant that nothing can arise from them to make an application to this case.

After these preliminary observations and before I advance to the full discussion of this question it may be necessary for the safety and accuracy of investigation, a little to define what this liberty of the press is, for which we contend and which the present doctrines or those opposed to us are, in our opinions, calculated to destroy.

The Liberty of the Press consists, in my idea, in publishing the truth from good motives and for justifiable ends, though it reflect on government, on magistrates or individuals. If it be not allowed it excludes the privilege of canvassing men and our rulers. It is in vain to say you may canvass measures. This is impossible without the right of looking to men. To say that measures can be discussed and that there shall be no bearing on those who are the authors of those measures, cannot be done. The very end and reason of discussion would be destroyed. Of what consequence to show its object? Why is it to be thus demonstrated if not to show, too, who is the author? It is essential to say not only that the measure is bad and deleterious, but to hold up to the people who is the author, that in this, our free and elective government, he may be removed from the seat of power. If this be not to be done, then in vain will the voice of the people be raised against the inroads of tyranny. For, let a party but get into power, they may go on from step to step and in spite of canvassing their measures, fix themselves firmly in their seats, especially as they are never to be reproached for what they have done. This abstract mode in practice can never be carried into effect. But if under the qualifications I have mentioned the power be allowed, the liberty for which I contend will operate as a salutary check. In speaking thus for the freedom of the Press I do not say there ought to be an unbridled license, or that the characters of men who are good, will naturally tend eternally to support themselves. I do not stand here to say that no shackles are to be laid on this license.

I consider this spirit of abuse and calumny as the pest of society. I know the best of men are not exempt from the attacks of slander. Though it pleased God to bless us with the first of characters and though it has pleased God to take him from us and this band of calumniators, I say that falsehood eternally repeated would have affected his name. Drops of water in long and continued succession will wear out adamant. This therefore cannot be endured. It would be to put the best and the worst on the same level.

I contend for the liberty of publishing truth with good motives and for justifiable ends, even though it reflect on government, magistrates or private persons. I contend for it under the restraint of our tribunals—when this is exceeded let them interpose and punish. From this will follow none of those consequences so ably depicted. When however we do look at consequences let me ask whether it is right that a permanent body of men appointed by the executive and in some degree always connected with it, should exclusively have the power of deciding on what shall constitute a libel on our rulers, or that they shall share it, united with a changeable body of men, chosen by the people. Let our Juries still be selected as they are now, by lot. But it cannot be denied that every permanent body of men is more or less liable to be influenced by the spirit of the existing administration; that such a body may be liable to corruption and that they may be inclined to lean over towards party modes. No man can think more highly of our judges and I may say personally so, of those who now preside than myself; but I must forget what human nature is, and what her history has taught us, that permanent bodies may be so corrupted, before I can venture to assert that it cannot be done. As then it may be I do not think it safe thus to compromise our independence. For though as individuals they may be interested in the general welfare, yet if once they enter into the views of government their power may be converted into the engine of oppression. It is in vain to say that allowing them this exclusive right to declare the law, on what the jury has found can work

no ill; for by this privilege they can assume and modify the fact so as to make the most innocent publication libelous. It is therefore not a security to say that this exclusive power will but follow the law. It must be with the jury to decide on the intent—they must in certain cases be permitted to judge of the law and pronounce on the combined matter of law and of fact. Passages have been adduced from Lord Mansfield's declarations to show that judges cannot be under the influence of an administration. Yet still it would be contrary to our experience to say that they could not. I do not think that even as to our own country it may not be. There are always motives and reasons that may be held up. It is therefore still more necessary here to mingle this power than in England. The person who appoints there is hereditary. That person cannot alone attack the judiciary; he must be united with the two houses of Lords and of Commons in assailing the judges. But with us it is the vibration of party. As one side or the other prevails, so of that class and temperament will be the judges of their nomination. Ask any man however ignorant of principles of government, who constitute the judicial? He will tell you the favorites of those at the head of affairs. According then to the theory of this our free government, the independence of our judges is not so well secured as in England. We have here reasons for apprehension not applicable to them. We are not however to be now influenced by the preference to one side or the other. But of which side soever a man may be, it interests all to have the question settled and to uphold the power of the jury consistently, however with liberty and also with legal and judicial principles, fairly and rightly understood. None of these impair that for which we contend: the right of publishing the truth from good motives and justifiable ends, though it reflect on government, on magistrates or individuals.

Some observations have however been made in opposition to these principles; it is said that as no man rises at once high into office, every opportunity of canvassing his quali-

ties and qualifications is afforded without recourse to the press; that his first election ought to stamp the seal of merit on his name. This however is to forget how often the hypocrite goes from stage to stage of public fame, under false array and how often when men attain the last object of their wishes they change from that they seemed to be. That men the most zealous reverers of the people's rights have, when placed on the highest seat of power, become their most deadly oppressors. It becomes therefore necessary to observe the actual conduct of those who are thus raised up.

I have already shown that although libeling will continue to be a crime, it ought to be so only when under a restraint in which the Court and the jury shall co-operate. What is a libel that it should be otherwise? Why take it out of the rule that allows in all criminal cases when the issue is general, the jury to determine on the whole? What is then a libel to induce this? That great and venerable man, Lord Camden, already cited with so much well deserved eulogy says, that he has never yet been able to form a satisfactory definition. All essays made towards it are neither accurate nor satisfactory; yet such as they are I shall cite them and animadvert.

Blackstone and Hawkins declare that it is any malicious defamation with an intent to blacken the reputation of any one dead or alive.

The criminal quality is its maliciousness. The next ingredient is that it shall have an intent to defame. I ask then if the intent be not the very essence of the crime. It is admitted that the word falsity, when the proceedings are on the statute, must be proved to the jury because it makes the offense. Why not then the malice, when to constitute the crime it must necessarily be implied? In reason there can be no difference.

A libel is then a complicated matter of fact and law with certain things and circumstances to give them a character. If so then the malice is to be proved. The tendency to provoke is its constituent. Must it not be shown and in what manner? If this is not to be the case must everyone who

does not panegyrisé be said to be a libeler? Unless the Court are disposed to go that extreme length it is necessary that the malice and intent must be proved. To this it is certain the definition of Lord Coke may in some degree be opposed. He does seem to superadd, "the breach of the peace." Lord Coke however does not give this as a specific definition; and even then the defamatory writing which he particularizes includes the question both of intent and malice. The breach of the peace therefore, is not made the sole, but only one, of the qualities. The question is not on the breaking of the peace, but depends on time, manner and circumstances, which must ever be questions of fact for jury determination. I do not advocate breaking the peace; observations may be made on public men which are calculated merely to excite the attention of the community to them. To make the people exercise their own functions, which may have no tendency to a breach of the peace, but only to inspection. For surely a man may go far in the way of reflecting on public characters without the least design of exciting tumult. He may only have it in view to rouse the nation to vigilance and a due exertion of their right to change their rulers. This then being a mere matter of opinion can it be not a matter for them to judge of, to whom it is addressed? The Court to be sure may like a jury, and in common with them, have the legal power and moral discernment to determine on this; yet it does not arise out of the writing but by adverting to the state of things and circumstances. It therefore answers no purpose to say it has a tendency to a breach of the peace.

Lord Loughborough in the *Parl. Chron.* 644-657, instances that passages from Holy Writ may be turned into libels.

Lord Thurlow admits that this may happen and that time and circumstances may enter into the question. He, it is true, sanctioned the doctrine of our opponents but allowed time and circumstances to be ingredients, and strange to say, though these are extrinsic to the record, was of opinion for the old law. Lord Thurlow says, however, that it might be something more than a bare libel, intimating here that

it may be even treason; and is it not then to confess that intent is a matter of fact? If so who, or where shall be the forum but the jury?

My definition of a libel is, and I give it with all diffidence after the words of Lord Cambden, my definition then is this: I would call it a slanderous or ridiculous writing, picture or sign, with a malicious or mischievous design or intent towards government, magistrates or individuals. If this definition does not embrace all that may be so called does it not cover enough for every beneficial purpose of justice? If it have a good intent it ought not to be a libel, for it then is an innocent transaction, and it ought to have this intent against which the jury have in their discretion to pronounce. It shows itself to us as a sentence of fact. Crime is a matter of fact by the code of our jurisprudence. In my opinion every specific case is a matter of fact, for the law gives the definition. It is some act in violation of law. When we come to investigate, every crime includes an intent. Murder consists in killing a man with malice prepense. Manslaughter in doing it without malice and at the moment of an impulse of passion. Killing may even be justifiable, if not praiseworthy, as in defense of chastity about to be violated. In these cases the crime is defined and the intent is always the necessary ingredient. The crime is matter of law as far as definition is concerned; fact as far as we are to determine its existence.

But it is said the judges have the right on this fact to infer the criminal intent, that being matter of law. This is true; but what do we mean by these words unless the act dependent on and united with its accessories such as the law has destined and which when proved constitute the crime. But whether the jury are to find it so with all its qualities is said to be a question; no act separate from circumstances can be criminal, for without these qualities it is not a crime. Thus, as I have before instanced, murder is characterized by being with malice prepense; manslaughter by being involuntary; justifiable homicide by having some excuse. Killing therefore is not a crime but it becomes so in consequence of

the circumstances annexed. In cases that are in the general opinion of mankind exceptions to the explanations I have given, the law contemplates the intent. In duelling the malice is supposed from the deliberate acts of reflecting, sending a challenge and appointing the time and place of meeting. Here it is true the law implies the intent, but then let it be remembered it is in consequence of its having previously defined the act and forbidden its commission. This too is on the principle of natural justice, that no man shall be the avenger of his own wrongs, especially by a deed alike interdicted by the laws of God and man. That therefore the intent shall in this case constitute the crime is because the law has declared it shall be so. It is impossible to separate a crime from the intent. I call on those opposed to us to say what is a libel. To be sure they have told us it is any scandalous publication, etc., which has a tendency to a breach of the peace. This indeed is a broad definition, which must for the purposes of safety be reduced to a positive fact with a criminal intent. In this there is no violation of law; it is a settled maxim that *mens facit reum; non reus, nisi sit mens rea*. When a man breaks into a house it is the intent that makes him a felon. It must be proved to the jury that it was his intention to steal; they are the judges of whether the intent was such or whether it was innocent. Then so I say should it be here; let the jury determine, as they have the right to do in all other cases on the complicated circumstances of fact and intent. It may as a general and universal rule be asserted that the intention is never excluded in the consideration of the crime. The only case resorted to and which is relied on by the opposite side (for all the others are built upon it) to show a contrary doctrine, was a Star Chamber decision. To prove how plainly the intent goes to the constituting the crime of libel the authority cited by the counsel associated with me is fully in point. In that the letter written to the father, though (as far as words were concerned) perfectly a libel, yet having been written for the purpose of reformation and not with an intent to injure, was held not to

amount to a libel. Suppose persons were suspected of forging public papers and this communicated by letter to the Secretary of State with a good design; still if the doctrines contended for were to prevail, it would be libelous and punishable though the party not only did it with the best of motives but actually saved the State. In madness and idiocy crimes may be perpetrated; nay the same malicious intent may exist but the crime does not. These things tend to show that the criminality of an act is matter of fact and law combined and on which it cannot belong to the exclusive jurisdiction of the Court to decide the intent. For the question is forever a question of fact.

“The criminal intent,” says Lord Mansfield in the Dean of St. Asaph’s case, “is what makes the crime.”

Here truly that great man—for great he was, and no one more really estimates him than I do, yet he might have some biases on his mind, not extremely favorable to liberty—here then he seems to favor the doctrine contended for, but he will be found to be at times contradictory, nay even opposed to himself. “A criminal intent in doing a thing in itself criminal—without a lawful excuse—is an inference of law.” How can that be in itself criminal which admits of a lawful excuse? Homicide is not in itself a crime, therefore it is not correct to say a criminal intent can be inferred because a lawful excuse may be set up. A thing cannot be criminal which has a lawful excuse but as it may have a certain quality which constitutes the crime. To be sure you may go on to say that where the intent bestows the character of criminality on an act indifferent, then it is a matter of fact and not where the act is bad in itself. But this is begging the question. We contend that no act is criminal, abstracted and divested of its intent. Trespass is not in itself innocent. No man has a right to enter another’s land or house. Yet it becomes in this latter case felony only in one point of view and whether it shall be holden in that point is a subject of jury determination. Suppose a man should enter the apartments of the King, this in itself is harmless, but if he do it with an intent

to assassinate, it is treason. To whom must this be made to appear in order to induce conviction, to the jury? Let it rather be said that crime depends on intent and intent is one parcel of the fact. Unless therefore it can be shown that there is some specific character of libel that will apply in all cases, intent, tendency and quality must all be matters of fact for a jury. There is therefore nothing which can be libel independent of circumstances; nothing which can be so called in opposition to time and circumstances. Lord Loughborough, indeed, in the parliamentary debates on this very subject to which I have referred the Court, admits this to be the case. Lord Mansfield embarrassed with the truth and strength of the doctrine, endeavors to contrast meaning with intent. He says that the truth may be given in evidence to show the meaning but not the intent. If this can be done to show the application where the person is imperfectly described, why not to prove the intent without which the crime cannot be committed? Whatever is done collaterally must show this and in all cases collateral facts are for the jury. The intent here has been likened to the construction of a deed or any written instrument in all of which the intent is for the Court. But the comparison will not hold; for even there the intent may be inquired of *aliunde*. When you go to qualify and explain, what is this but to decide on the intent by matters of fact? Lord Mansfield is driven into this contradiction when on one occasion he says it is a matter on which the jury may exercise their judgment and in another that it is not. I am free to confess that in difficult cases it is the duty of a jury to hearken to the directions of a judge with very great deference. But if the meaning must be either on the face of the libel or from anything *aliunde* then it must be a matter of fact for the jury. That the *quo animo* affects the constitution of libel cannot be disputed and must be inquired of by somebody. Now unless this is to be tried by the jury by whom is it to be determined? Will any man say that in the case in the Star Chamber respecting the letter written to the child's father the intent

is not the reason why it was held innocent and the *quo animo* not gone into? Did they not then endeavor to prove the guilt by the intent? Now if you are to show things malicious *aliunde* you may defend by the same means. The *mens* is the question and in common parlance it is that to which we resort to show guilt—11 Mod. The Queen v. Brown, will explain how it is to be found. Nay, in this very case when the counsel for the defendant objected to the Attorney-General's reading passages from the prospectus of the *Wasp* and from other numbers, he expressly avowed that he thus acted in order that the jury might see it to be "manifest that the intent of the defendant was malicious." This I here observe, is a mistake that law officers would not be very apt to slide into. Yet on this very intent this malicious intent thus proved to the jury and on which they founded their verdict, is the Court now asked to proceed to judgment. To demonstrate how fully this matter of intent is by our law a subject of jury determination, suppose the Grand Jury had in the present case returned to the bill *ignoramus*, on what would they have founded their return? Is not this then a precedent that the *quo animo* is for a jury? If it be necessary only to find the publication, why is not the Grand Jury competent for the whole? For if the supposition is that the Grand Jury may decide on the finding of the bill, surely the petit jury may acquit. If so then is the case I have mentioned an important precedent. In *Rex v. Horne*, an authority that has been justly urged, the principle is allowed. It appears there that the jury are to exercise their judgment from the nature of the act what is its intent. Into a confession of this is Lord Mansfield himself driven. *Regina v. Fuller*, we are told from the other side, was a case on the statute for *scandalum magnatum*. Of this however I can find no trace in the books and there Lord Holt repeatedly interrogated as to the truth, would have allowed it to be given in evidence and directed the jury that if they did not believe the allegations false they were not to find the defendant guilty. This then is a decision, as we contend that not only the intent but the

truth is important to constitute the crime and nothing has been shown against it. Nay, Lord Holt goes on still further; he bids the jury consider whether the papers have not a tendency to beget sedition, riot and disturbance. Surely this authority of that great man demonstrates that intent and tendency are matters of fact for a jury. This argument will be further strengthened when I enumerate those cases where truth has been permitted to be shown. But before I do that I must examine how far truth is to be given in evidence. This depends on the intent's being a crime. Its being a truth is a reason to infer that there was no design to injure another. Thus not to decide on it would be injustice as it may be material in ascertaining the intent. It is impossible to say that to judge of the quality and nature of an act the truth is immaterial. It is inherent in the nature of things that the assertion of truth cannot be a crime. In all systems of law this is a general axiom, but this single instance it is attempted to assert, creates an exception and is therefore an anomaly. If, however, we go on to examine what may be the case what shall be so considered, we cannot find it to be this. If we advert to the Roman law we shall find that Paulus and Pereizius take a distinction between those truths which relate to private persons and those in which the public are interested. Vinnius lays it down in the doctrine cited by the associate counsel who last spoke. If then we are to consider this a doctrine to be adopted in all that relates to public men, it ought now to be received. When we advert to the statutes they confirm our positions. These statutes are indisputably declaratory of the early law. We know that a great part of the common law has been for certainty reduced to statutes. Can we suppose that the common law did not notice that no punishment was to be inflicted for speaking the truth when we see a statute thus enacting?

Therefore the fair reasoning is that they are declaratory of the common law. That by our code falsehood must be the evidence of the libel. If we apply to precedents they are decidedly for us. In the case cited from 7 D. and E. this

is admitted, for there it is allowed that the word "false" is contained in all the ancient forms. This then is a strong argument for saying that the falsity was by the common law considered a necessary ingredient. It is no answer to say that in declarations for assault we use the words "sticks, staves, &c." When instruments are named this imports only one or the other which might be used, but when a word by way of epithet that it means a precise idea, we are to take it as if introduced for the purpose of explaining the crime. As to the practice on this occasion we must take various epochs of the English history into consideration. At one time that the law was as we have shown is proved by the statutes. At that time the truth was clearly drawn into question and that since the period of Lord Raymond a different practice has prevailed, is no argument against the common law. The authority from the third Institute is conclusive, at least satisfactory, to show that it was then necessary to show the words were true. *Ed quid etc. quae litera in se continet nullam veritatem ideo etc.* Is it to be supposed that the truth in this case was not inquired into when the want of it is the reason of the judgment? Unless this had been gone into, the Court would not, nor could not, have spoken to it. The insertion of that then is a strong argument that this was the old law, and it shows us what the law was. In the case of the Seven Bishops they were allowed to go into all the evidence they wanted. The Court permitted them to read everything to show it.

On that occasion Halloway and all agree as to the admissibility of the truth. But this case is important in another view as it shows the intent ought to be inquired into, for the Bishops might have done it either with a seditious or an innocent motive. They declare that by the law they could not do the act required. They exculpated themselves by an appeal to their consciences. This shows the necessity of inquiring into the intent of the act.

In *Rex v. Fuller* this very atrocious offender was indicted for a most infamous libel and yet Lord Holt at every breath asked him, can you prove the truth? At the time, then, when

this was done, there were some things in favor of the truth. It stands then a precedent for what we contend. I shall now notice some intermediate authorities between that day and those in which a contrary principle has been endeavored to be supported. It is true that the doctrine originated in one of the most oppressive institutions that ever existed. In a court where oppressions roused the people to demand its abolition, whose horrid judgments cannot be read without freezing the blood in one's veins. This is not used as declamation but as argument. If doctrine tends to trample on the liberty of the press, and if we see it coming from a foul source, it is enough to warn us against polluting the stream of our own jurisprudence. It is not true that it was abolished merely for not using the intervention of juries or because it proceeded *ex-parte*, though that, God knows, would have been reason enough, or because its functions were discharged by the court of King's Bench. It was because its decisions were cruel and tyrannical, because it bore down the liberties of the people and inflicted the most sanguinary punishments. It is impossible to read its sentences without feeling indignation against it. This will prove why there should not be a paramount tribunal to judge of these matters.

Want's Case is the first we find on this subject; but even then we do not meet the broad definition of Lord Coke in the case *de famosis libellis*. I do not deny this doctrine of the immateriality of the truth as a universal negative to a publication's being libelous though true. But still I do say that in no case may you not show the intent. For whether the truth be a justification will depend on the motives with which it was published.

Personal defects can be made public only to make a man disliked. Here, then, it will not be excused; it might however be given in evidence to show the libelous degree. Still, however it is a subject of inquiry. There may be a fair and honest exposure. But if he uses the weapon of truth wantonly, if for the purpose of disturbing the peace of families, if for relating that which does not appertain to

official conduct, so far, we say, the doctrine of our opponents is correct. If their expressions are that libelers may be punished though the matter contained in the libel be true, in these I agree. I confess that the truth is not material as a broad proposition respecting libels. But that the truth cannot be material in any respect is contrary to the nature of things. No tribunal, no codes, no systems can repeal or impair this law of God, for by His eternal laws it is inherent in the nature of things. We first find this large and broad position to the contrary in 5 Rep. And here it is to be noticed that when Lord Coke himself was in office, when he was attorney-general and was allowed to give his own opinion, he determines the truth to be material. But when he gets into that court and on that bench which had pronounced against it, when he occupies a Star-Chamber seat, then he declares it is immaterial. I do not mention this as derogating from Lord Coke, for to be sure he may be said to have yielded; but this I say is the first case on this point in which he seems to be of a contrary opinion. We do not in every respect contend even against his last ideas, we only assert that the truth may be given in evidence. But this we allow is against the subsequent authorities which in this respect overturn the former precedents. These latter however are contrary to the common law; to the principles of justice and truth. That the doctrine that juries shall not judge on the whole matter of law and fact or the intent and tendency of the publication is not to be found in the cases before the time of Lord Raymond; and it is contrary to the spirit of our law because it may prevent them from determining on what may perhaps be within their knowledge. It was only by Lord Raymond that this was first set up and acted upon and this has been followed by Lord Mansfield and his successors. Here, then, have been a series of precedents against us. Blackstone too says that the truth may not be given in evidence so as to justify: and so, with the qualifications I have before mentioned, do we. Prior indeed to his time Lord Holt had laid down the law in one or two cases in conformity to that of the other side and

latter times have given this a currency by a coincidence of precedents in its favor. A reflection may perhaps be here indulged that from what I have before remarked on Lord Coke, it is frequent for men to forget sound principles and condemn the points for which they have contended. Of this the very case of the Seven Bishops is an example, when those who there maintained the principles for which we contend, supplanted the persons then in power, they were ready to go the whole length of the doctrine that the truth could not be given in evidence on a libel. This is an admonition that ought at all times to be attended to; that at all times men are disposed to forward principles to support themselves. The authority of Paley has been adduced, if indeed he may be called an authority. That moral philosopher considers everything as slanderous libels, whether true or false, if published with motives of malice.

In these cases he does not consider the truth a justification. Nor do we; we do not say that it is alone always a justification of the act, and this we say consistent with sound morality, is good law and good sense. On what ought a court to decide on such an occasion as this? Shall they be shackled by precedents, weakened in that very country where they were formed? or rather shall they not say that we will trace the law up to its source? We consider, they might say, these precedents as only some extraneous bodies engrafted on the old trunk; and as such I believe they ought to be considered. I am inclined to think courts may go thus far, for it is absolutely essential to right and security that the truth should be admitted. To be sure this may lead to the purposes suggested. But my reply is that government is to be thus treated if it furnish reasons for calumny. I affirm that in the general course of things the disclosure of truth is right and prudent, when liable to the checks I have been willing it should receive, as an object of animadversion.

It cannot be dangerous to government though it may work partial difficulties. If it be not allowed they will stand liable to encroachments on their rights. It is evident that

if you cannot apply this mitigated doctrine for which I speak to the cases of libels here, you must forever remain ignorant of what your rulers do. I never can think this ought to be; I never did think the truth a crime; I am glad the day is come in which it is to be decided; for my soul has ever abhorred the thought that a free man dared not speak the truth; I have forever rejoiced when this question has been brought forward.

I come now to examine the second branch of this inquiry; the different provinces of the court and the jury. I will introduce this subject by observing that the trial by jury has been considered in the system of English jurisprudence as the palladium of public and private liberty. In all the political disputes of that country this has been deemed the barrier to secure the subjects from oppression. If in that country juries are to answer this end, if they are to protect from the weight of state prosecutions they must have this power of judging of the intent in order to perform their functions; they could not otherwise answer the ends of their institution. For under this dangerous refinement of leaving them to decide—only the fact of composing and publishing anything on which they may decide may be made a libel. I do not deny the well known maxim that to matters of fact, the jury, and to matters of law the judges, shall answer. I do not deny this because it is not necessary for the purposes of this or any other case, that it should be denied. I say with this complicated explanation I have before given of the manner in which the intent is necessarily interwoven in the fact, the court has the general cognizance of the law. In all cases of ancient proceedings the question of law must have been presented.

It was in civil cases alone that an attaint would lie. They have, it is said, the power to decide in criminal, on the law and the fact. They have then the right because they cannot be restricted in its exercise; and in politics, power and right are equivalent. To prove it what shall we say to this case? Suppose the legislature to have laid a tax which by the Constitution they certainly are entitled to impose,

yet still the legislature may be guilty of oppression; but who can prevent them or say they have not authority to raise taxes? Legal power then is the decisive effect of certain acts without control. It is agreed that the jury may decide against the direction of the court and that their verdict of acquittal cannot be impeached but must have its effect. This then I take to be the criterion that the Constitution has lodged the power with them and they have the right to exercise it. For this I could cite authorities. It is nothing to say in opposition to this that they, if they act wrong, are to answer between God and their consciences. This may be said of the Legislature and yet nevertheless they have the power and the right of taxation. I do not mean to admit that it would be proper for the jurors thus to conduct themselves but only to show that the jury do possess the legal right of determining on the law and the fact. What then do I conceive to be the true doctrine? That in the general distribution of power in our constitution it is the province of the jury to speak to fact, yet in criminal cases the consequences and tendency of acts the law and the fact are always blended. As far as the safety of the citizen is concerned, it is necessary that the jury shall be permitted to speak to both. How then does the question stand? Certainly not without hazard. Because inasmuch as in the general distribution of power the jury are to be confined to fact, they ought not wantonly to depart from the advice of the court; they ought to receive it if there be not strong and valid reasons to the contrary; if there be, they should reject. To go beyond this is to go too far. Because it is to say when they are obliged to decide by their oath according to the evidence they are bound to follow the words of the judge. After they are satisfied from him what the law is they have a right to apply the definition. It is convenient that it should be so. If they are convinced that the law is as stated, let them pronounce him guilty; but never let them leave that guilt for the judge, because if they do the victim may be offered up and the defendant gone. Will anyone say that under forms of law we may

commit homicide? Will any directions from any judge excuse them? I am free to say I would die on the rack were I to sit as a juror, rather than confirm such a doctrine, by condemning the man I thought deserved to be acquitted; and yet I would respect the opinion of the judge, from which however I should deem myself at liberty to depart and this I believe to be the theory of our law.

These are the propositions I shall endeavor to maintain. I have little more to do than examine how far precedents accord with principles and whether any establish a contrary doctrine. I do not know that it is necessary to do more than has already been done by my associate counsel, and yet perhaps I should not complete my duty without adverting to what has fallen on this point from our opponents. There is not one of the ancient precedents in which our doctrine has not in general prevailed, and it is indeed to be traced down to one of a modern date. The case of the Seven Bishops is that to which I allude. There it was permitted to go into the truth, and all the court submitted the question to the jury. This case deserves peculiar attention. If on the one hand it was decided at a time when the nation was considerably agitated, it was on the other hand at a time when great constitutional questions and points were discussed and resolved. The great one was the power of the jury, and this power was submitted to, to extricate the people for the salvation of the nation from the tyranny with which they were then oppressed. This was one of the reasons which brought about their glorious revolution and which perhaps tended to the maturing those principles which have given us ours. This ought to be considered as a landmark to our liberties, as a pillar which points out to us on what the principles of our liberty ought to rest; particularly so if we examine it as to its nature and the nature of the attempts then made to set up and support the endeavors to construe an act of duty a libel. A deed in which conscience did not permit those reverend characters to act in any other way than what they did, a respect to which they held a bounded duty. It is a prece-

dent then on which we should in every way fasten ourselves. The case of Fuller is of minor importance. Yet that is one in which Lord Holt called on the defendant to enter into the truth. In *King v. Tutchin*, Lord Holt expressly tells the jury, you are to consider whether the tendency of this writing be not to criminate the administration; you, the jury, are to decide on this. Owen's case is to the same effect. There Lord Camden was of Counsel and in the discussion in the House of Lords he tells us, and surely his testimony is good, that being of counsel for defendant he was permitted to urge to the jury a cognizance of the whole matter of libel. That in the case of *Shepard* where by his official situation he was called on to prosecute for the crown, where the interests of government called on him to maintain an opposite doctrine, yet then he insisted for a verdict on the whole matter from the consideration of the jury. In *King v. Horne*, Lord Mansfield himself tells the jury they have a right to exercise their judgment from the nature of the intent. This surely then is a precedent down to a late period. It is not however to be denied that there is a series of precedents on the other side. But as far as precedents of this kind can be supported they can rest on precedents alone, for the fundamental rights of juries show that as by their power they can effect a question of this nature, so, politically speaking they have the right. To ascertain this it is necessary to inquire whether this law now contended for, uniformly and invariably formed the practice of all the judges in Westminster Hall. For if so then an argument may with more propriety be raised, but if it was disputed then it is to be doubted. Precedents ought to be such as are universally acknowledged and this, if we are to credit the highest authority, was not the invariable practice. Lord Loughborough says that his practice was the other way. He declares that he invariably left the whole to the jury, and Lord Camden gives us to understand the same thing. Here then is proof that it was not universally acquiesced in and this by some of the most respected characters that ever sat on a bench. Can we call this a settled practice, a

practice which is contradicted by other precedents? Have they not varied? I consider nothing but a uniform course of precedents so established that the judges invariably conform to it in their judicial conduct as forming a precedent. When this is not the case we must examine the precedent and see how far it is conformable to principles of general law. If then they have not that character of uniformity which gives force to precedents, they are not to be regarded, for they are too much opposed to fundamental principles. The court may therefore disregard them and say the law was never thus settled. It was a mere floating of litigated questions. Different conduct was pursued by different men and therefore the court is at liberty to examine the propriety of all and if it be convenient that a contrary mode should be adopted, we ought to examine into what has been done, for we have a right to do so and it is our sacred duty.

When we pass from this to the declaratory law of Great Britain the whole argument is enforced by one of the first authority. I do not consider it as binding but as an evidence of the common law. If so I do not see why we may not now hold it as evidence of other evidence, that the law had not been settled by a regular course of judicial precedents. On all the debates on this question it is denied to have been so settled. It must then be confessed that if it was so the law was one thing and the practice another. That to put it out of doubt was the end and object of Mr. Fox's bill. Therefore it is in evidence that the law was not settled in that country. I notice another fact or historical evidence of this; it is what was mentioned by Lord Lansdowne in the very debates to which I have before alluded. It is that twenty years before a similar act was brought forward and dropped. Here then is a matter of fact to show that in the consideration of that nation the doctrines of Lord Mansfield were never palatable nor settled and that the opinions of judges and lawyers were considered by many as not the law of the land. Let it be recollected too that with that nation the administration of justice in the last resort is in the House of Lords. That being so it

gives extreme weight to a declaratory act, as it shows the sense of the highest branch of judicature of that country. It is in evidence that what we contend for was and had been the law and never was otherwise settled. It is a very honorable thing to that country in a case where party passions had been excited to a very great height, to see that all united to bring it in. It was first introduced by Mr. Fox, the principal officers of the crown acquiesced, the prime minister gave it his support and in this they were aided by many of the great law Lords. All parties concurred in declaring the principles of that act to be the law and not only does the form prove it to be declaratory but when the court read the debates on that subject they will see this to be the fact. Adding the word enacted to a bill does not vary the conclusion of its being declaratory. The word enacted is commonly superadded but the word declared is never used, but when it is intended that the act shall be considered as declaratory and when they insert the word, declare it is because they deem it important that it should be so understood. This I deem conclusive evidence of the intent. Thus also it was understood by all judges except Lord Kenyon and he does not say that it was not declaratory. To be sure he makes use of some expressions that look that way, such as, "that the act had varied the old law." But not one word to show that it was not intended by Parliament to be a declaratory law. But it would not be surprising that Lord Kenyon, who opposed the passing of the act, should in a judicial decision still adhere to his old ideas. This however does not affect the evidence which arises from the words of the act. I join in issue then whether this be sufficient evidence to the court. For I contend that notwithstanding the authority of Lord Kenyon and the cases on the other side, the conclusions they maintain would be unfair. For if these conclusions necessarily tend to the subversion of fundamental principles though they be warranted by precedents, still the precedents ought not to weigh. But should they have settled the law by their precedents, still this court will admit any evidence to show

that the facts are otherwise and the law never was as they have settled it. In this case, then, I say as matters of evidence, these precedents shall not prevail and shall not have any effect. In practice on this declaratory act they have gone into a construction important to our argument. But previously to entering into this I shall make one observation to show the nature of this act to be declaratory, the recital stated it to be so.

Mr. Spencer: The whole matter in issue are the words.

Mr. Hamilton: Is it to be doubted that every general issue includes law and fact? Not a case in our criminal code in which it is otherwise. The construction, the publication, the meaning of the innuendoes, the intent and design are all involved in the question of libel and to be decided on the plea of not guilty, which puts the whole matter in issue. It is therefore a subtlety to say that the fact and law are not in issue. There can be no distinction taken even by judges between libels and other points. But will it be said that when this question was before the parliament whether the law and fact should be in issue, that the parliament did not mean to give the power to decide on both? It is a mere cavil to say that the act did not mean to decide on this very point. The opposition of the twelve judges has been much insisted on. But in my opinion they have given up the point as to the right of the jury to decide on the intent. They, in some part of their answer, assert the exclusive power of the court; they deny in terms the power of the jury to decide on the whole. But when pressed on this point as to a letter of a treasonable nature how do they conclude? Why, the very reverse of all this. Here then we see the hardship into which the best of men are driven when compelled to support a paradox. Can the jury do it with power and without right? When we say of any forum that it can do and may hazard the doing a thing, we admit the legal power to do it. What is meant by the word hazard? If they choose to do it they have then the legal right, for legal power includes the legal right. This is really only a question of words. But in the exercise of this

right moral ideas are no doubt to restrain, for the conscience ought to decide between the charge and the evidence which ought to prevail, one side or the other. The moment however that question as to the power is admitted the whole argument is given up. I consider the judges driven to yield up at the conclusion of their opinion that point for which they had in the former parts contended. Thus, then, stands the matter on English conduct and on English precedents. Let us see if anything in the annals of America will further the argument. Zenger's case has been mentioned as an authority. A decision in a factious period and reprobated at the very time. A single precedent never forms the law. If in England it was fluctuating in an English court, can a colonial judge of a remote colony ever settle it? He cannot fix in New York what was not fixed in Great Britain. It was merely one more precedent to a certain course of practice. But because a colonial governor exercising judicial power subordinate to the judges of the mother country, decides in this way, can it be said that he can establish the law and that he has by a solitary precedent fixed what his superior could not? The most solemn decisions of the court of King's Bench are at one time made and at another time over-ruled. Why are our courts to be bound down by the weight of only one precedent? Is a precedent like the laws of the Medes and Persians, never to be changed? This is to make a colonial precedent of more weight than is in England allowed to a precedent of Westminster Hall. To pursue the precedents more emphatically our own, let us advert to the sedition law, branded indeed with epithets the most odious, but which will one day be pronounced a valuable feature in our national character. In this we find not only the intent but the truth may be submitted to the jury and that even in a justificatory manner. This I affirm was on common law principles. It would however be a long detail to investigate the applicability of the common law to the Constitution of the United States. It is evident however that parts of it use a language which refers to former principles. The *Habeas Corpus*

is mentioned and as to treason it adopts the very words of the common law. Not even the legislature of the Union can change it. Congress itself cannot make constructive or new treasons. Such as the general tenor of the Constitution of the United States that it evidently looks to antecedent law. What is on this point the great body of the common law? Natural law and natural reason applied to the purposes of society. What are the English courts now doing but adopting natural law?

What have the Court done here? Applied moral law to constitutional principles and thus the judges have confirmed this construction of the common law, and therefore I say by our constitution it is said the truth may be given in evidence. In vain is it to be replied that some committee met and in their report gave it the name of amendment. For when the act says declared I say the highest Legislative body in this country have declared that the common law is, that the truth shall be given in evidence, and this I urge as a proof of what that common law is. On this point a fatal doctrine would be introduced if we were to deny the common law to be in force according to our Federal Constitution. Some circumstances have doubtless weakened my position. Impeachments of an extraordinary nature have echoed through the land. Charging as crimes things unknown and although our judges according to that Constitution must appeal to the definitions of the common law for treasons, crimes and misdemeanors. This no doubt was that no vague words might be used. If then we discharge all evidence of the common law they may be pronounced guilty *ad libitum*; and the crime and offense being at once at their will there would be an end of that Constitution.

By an analogy a similar construction may be made of our own Constitution and our judges thus got rid of. This may be of the most dangerous consequences. It admonishes us to use with caution these arguments against the common law. To take care how we throw down this barrier which may secure the men we have placed in power, to guard against a spirit of faction that great bane to community,

that mortal poison to our land. It is considered by all great men as the natural disease of our form of government and therefore we ought to be careful to restrain that spirit. We have been careful that when one party comes in it shall not be able to break down and bear away the others. If this be not so in vain have we made constitutions, for if it be not so then we must go into anarchy and from thence to despotism and to a master. Against this I know there is an almost insurmountable obstacle in the spirit of the people. They would not submit to be thus enslaved. Every tongue, every arm would be uplifted against it; they would resist and assist and resist till they hurled from their seats those who dared make the attempt. To watch the progress of such endeavors is the office of a free press. To give us early alarm and to put us on our guard against the encroachments of power. This then is a right of the utmost importance, one for which instead of yielding it up we ought rather to spill our blood.

Going on however to precedents, I find another in the words of Chief Justice Jay when pronouncing the law on this subject. The jury are in the passage already cited, told the law, and the fact is for their determination, I find him telling that it is their right. This admits of no qualification. The little, miserable conduct of the judge in Zenger's case, when set against this, will kick the beam and it will be seen that even the twelve judges do not set up with deference however to their known abilities that system now insisted on. If the doctrine for which we contend is true in regard to treason and murder it is equally true in respect to libel. For there is the great danger. Never can tyranny be introduced into this country by arms; these can never get rid of a popular spirit of inquiry; the only way to crush it down is by a servile tribunal. It is only by the abuse of the forms of justice that we can be enslaved. An army never can do it. For ages it can never be attempted. The spirit of the country with arms in their hands and disciplined as a militia would render it impossible. Every pretense that liberty can be thus invaded is idle

declamation. It is not to be endangered by a few thousands of miserable, pitiful military. It is not thus that the liberty of this country is to be destroyed. It is to be subverted only by a pretense of adhering to all the forms of law and yet by breaking down the substance of our liberties. By devoting a wretched but honest man as the victim of a nominal trial. It is not by murder, by an open and public execution that he would be taken off. The sight of this, of a fellow citizen's blood would at first beget sympathy; this would rouse into action and the people in the madness of their revenge would break on the heads of their oppressors the chains they had destined for others.

One argument was stated to the Court of a most technical and precise kind. It was that which relates to putting on the record a part only of the libel. That on this no writ of error would lie. What was the answer given, that it could not be presumed judges could be so unjust. Why it requires neither prejudice nor injustice it may be matter of opinion. The argument goes to assert that we are to take for granted the infallibility of our judges. The Court must see that some better reason must be given. That it must be shown that this consequence cannot ensue. If not it is decisive against the argument. Surely this question deserves a further investigation. Very truly and righteously was it once the intention of the Attorney-General that the truth should have been given in evidence. It is desirable that there should be judicial grounds to send it back again to a jury. For surely it is not an immaterial thing that a high official character should be capable of saying anything against the father of this country.

It is important to have it known to the men of our country, to us all, whether it be true or false; it is important to the reputation of him against whom the charge is made that it should be examined. It will be a glorious triumph for truth, it will be happy to give it a fair chance of being brought forward; an opportunity in case of another course of things to say that the truth stands a chance of being the criterion of justice. Notwithstanding however the

contrary is asserted to be the doctrine of the English courts, I am, I confess, happy to hear that the freedom of the English is allowed; that a nation with Kings, Lords and Commons can be free. I do not mean to enter into a comparison between the freedom of the two countries. But the Attorney-General has taken vast pains to celebrate Lord Mansfield's character. Never till now did I hear that his reputation was high in republican estimation; never till now did I consider him as a model for republican imitation. I do not mean however to detract from the fame of that truly great man, but only conceived his sentiments were not those fit for a republic. No man more truly reveres his exalted fame than myself; if he had his faults, he had his virtues and I would not only tread lightly on his ashes but drop a tear as I passed by. He indeed seems to have been the parent of the doctrines on the other side. Such however we trust will be proved not to be the doctrines of the common law nor of this country and that in proof of this a new trial will be granted.

May 30.

Today the Court delivered Judgment. JUDGE KENT and JUDGE THOMPSON held that the defendant was entitled to give in evidence the truth of the alleged libel and that the Jury had a right to judge not only of the fact of the publication but of the whole matter in issue. CHIEF JUSTICE LEWIS and JUDGE LIVINGSTON were of the contrary opinion. THE COURT being evenly divided the motion for a new trial was lost and the Prosecution became entitled to move for judgment upon the verdict. But this was never done.

THE TRIAL OF WILLIAM P. DARNES FOR THE KILLING OF ANDREW J. DAVIS, ST. LOUIS, MISSOURI, 1840.

THE NARRATIVE.

Andrew J. Davis, who not long before had come from Massachusetts, was, in 1840, the publisher in St. Louis of a Democratic newspaper called *The Argus*, and Col. William Gilpin was the editor. An article appeared in the paper denouncing a certain class of politicians and Mr. Darnes assumed that it applied to him and addressed a note to Mr. Davis asking for an explanation. Mr. Davis refused to give it and the next morning Col. Gilpin announced himself as the author and proclaimed his readiness to give satisfaction to any person who felt himself aggrieved. Gilpin was well known to be a fighting man, while Mr. Davis, who had nothing to do with the editorial department of the paper, was a small, inoffensive man who never engaged in broils or difficulties with anyone. Darnes, who was a large, stout man, instead of meeting Gilpin, waylaid Mr. Davis at midday near the National Hotel on Third and Market streets, and struck him several severe blows with an iron cane, the butt-end of which was lead covered with leather. The first blow was struck with the small end and the others with the butt-end, resulting in several fractures of the skull. He was immediately taken to the hospital and died on the eighth day. On being told that he killed Mr. Davis, Darnes replied, "I don't care if I have, I have got my revenge." On the day of the difficulty, Dr. Beaumont,¹ a skillful surgeon with an international

¹ BEAUMONT, WILLIAM (1785-1853). Born Lebanon, Conn. Studied medicine at St. Albans, Vt., where he was licensed to practice (1812); removed to Plattsburg, N. Y., where he practiced until commissioned as army surgeon. Served through war of 1812, then became post surgeon at Ft. Macinac, Ft. Niagara and Ft. Crawford and St. Louis 1813-1840. Practiced medicine in St. Louis 1840-1853. President Medical Society of Missouri 1840-43. In his inaugural

reputation, in presence of other surgeons, performed the operation known as trephining, a dangerous one requiring great skill and resorted to only in extreme cases.

Darnes was indicted for manslaughter and the trial which took place in November created the greatest excite-

address he said (referring to the Darnes Trial): "Does not gratuitous swearing or rank perjury before courts of law, designed to screen a murderer from condign punishment and blacken the characters and blast the fair reputation of honest and honorable members of the profession, go unpunished, unabated and unwhipped of justice?" Died in St. Louis. At Ft. Macinac is a monument with this inscription: "Near this spot Dr. William Beaumont made those experiments upon St. Martin which brought fame to himself and honor to American medicine. Erected by the upper Peninsular and Michigan State Medical Societies, June 10, 1900." His biographer says: "Destiny let fall in his path the opportunity which he recognized, grasped and improved with a zeal and an unselfishness not excelled in the annals of medical science. Ever since that time the story of Dr. Beaumont and the case of Alexis St. Martin has had a peculiar fascination for persons in various walks of life—from the school boy who gains his first knowledge of the incident from his 'Essentials of Physiology' to the scientist who, by comparison of Beaumont's work with the most recent developments in the physiology of digestion, marvels at the thoroughness of this remarkable piece of research, conducted by a young army officer under the most discouraging circumstances."

He acquired a world-wide fame among scientists through his relations as surgeon to Alexis St. Martin. One day in June 1822 a number of French voyageurs were in a store of the American Fur company at Ft. Macinac where they were accustomed to buy their buckskin coats, moccasins, flannel shirts and gaudy neckties, when an accident occurred, "destined," says Dr. Myer, "to leave its imprint on the pages of medical history for all time to come." A gun was accidentally discharged and one of the men, Alexis St. Martin, a youth of 19, dropped to the floor with a cavity in the left upper abdomen as large as a man's fist—a mortal wound, it seemed. Dr. Beaumont, the army surgeon, arriving in a few minutes took charge of the case, had him removed to the hospital and to use his own words, "applied the best means in my power and took the responsibility of his surgical treatment and medical attendance." The patient recovered and lived to be nearly 80, "indebted to his stomach for an earthly immortality." For when the wound healed it left an orifice through which his stomach could be clearly seen and into which food could be placed and withdrawn. Dr. Beaumont saw at once the possibility of learning the action of the stomach in this way and immediately began experiments, for he was not only able to watch the process of digestion but to ascertain the length of time required to digest different foods by suspending them in

ment in the city, the court-room being densely packed from morning till night. The State was represented by Peter H. Engle, afterwards a Circuit Judge, and Thomas T. Gantt, afterwards a Judge of the Court of Appeals; and the prisoner by Henry S. Geyer, of whom the historian of the Missouri Bar says:

"If called upon to decide who in our judgment was the greatest lawyer at the Missouri Bar we should unhesitatingly say Henry S. Geyer; not that he was the superior of Gamble², Leonard³ or Field⁴ in his knowledge of the law relating to real-estate; not that he was the equal of Josiah Spalding⁵ as a commercial lawyer; nor the equal of Edward Bates⁶ in impassioned eloquence, yet taking everything into consideration he was the superior of all;"

Beverly Allen and Joseph B. Crockett, later an associate Justice of the Supreme Court of California.

The defense was first: that at the time and under the then conditions, there was no other remedy for a man who

the stomach by a silk string. He kept the patient with him for several years at a fixed wage and the result of the experiments were published by him in his work, "Experiments and observations on the gastric juice and the physiology of digestion" (1833), of which Sir William Osler has said, "To the medical bibliographer there are few more treasured Americana than this brown-backed, poorly printed, octavo volume of 250 pages."

² See 13 Am. St. Tr. 240.

³ LEONARD, ABIEL (1797-1863). Born Windsor, Vt. Educated at Dartmouth Coll. Studied law at Whiteboro, N. Y., and admitted to Bar 1818. Removed next year to Missouri settling first at Franklin, then at Booneville and finally establishing his home at Fayette; States Atty. 1823; Member State Legislature, 1834; Judge Supreme Court, 1855-1863; "As a jurist Judge Leonard never had a superior in our State." (Bay, Bench and Bar of Mo. 363)'

⁴ See 2 Am. St. Tr. 207.

⁵ In his book Mr. Bay says that Josiah Spaulding was a native of Connecticut, that he graduated at Yale in 1817, studied law in New York after being a tutor at Columbia College and removed to St. Louis in the winter of 1819-20 where he entered upon the practice of his profession. He was connected with the editorial department of the Missouri Gazette for a short time, but soon relinquished it "and in a short time acquired a large and lucrative practice, which enabled him to accumulate a fair competency." Mr. Bay does not give the dates of his birth and death, but states that he had died before he wrote (1878).

⁶ See 2 Am. St. Tr. 207.

⁷ Bay, Bench and Bar of Missouri, 148.

was attacked by a newspaper but to take the law into his own hands and punish the libeler; that the right of self-defense of character was as perfect as that of self-defense of life, independent of any statute permitting it and bound to exist in spite of any statute to the contrary.

The most eminent surgeons and physicians of St. Louis were called upon to testify as to the nature and effect of the operation and it was agreed between counsel that the writings of Sir Astley Cooper and other foreign authorities on that subject should be received as evidence in the cause. This opened a very wide field of inquiry and it was argued as a second defense that Davis' death was due not to the blows received on his head but to the operation performed by Beaumont.

Mr. Geyer spent two days in the delivery of one of the most profound arguments ever heard in a court of justice. It was published in pamphlet form and republished both in Boston and Worcester, Massachusetts. It gave him at once a national reputation as a lawyer and an orator. Mr. Geyer's argument won the jury who convicted the prisoner of manslaughter in the fourth degree, with a fine of \$500, which was virtually a verdict of acquittal.

THE TRIAL.^s

*In the Criminal Court of St. Louis County, St. Louis,
Missouri, November, 1840.*

HON. JAMES B. BOWLIN^o, Judge.

November 5.

In September an indictment was returned by the Grand Jury of the county that William P. Darnes, laborer, did on the 1st June, 1840, make an assault on Andrew J. Davis, in said county, "feloniously and in the heat of passion and without a design to effect death, but with a dangerous

^s *Bibliography.* "A Full and Accurate account of the Trial of William P. Darnes on an indictment found by the Grand Jury of St. Louis County at the September Term, 1840, of the Criminal Court of said County on a charge of manslaughter in the third degree for the death of Andrew J. Davis, (late of Northboro,

weapon, an iron cane, with a large head, and did then and there in and upon the forepart of the head of him, the said Andrew Davis, feloniously did strike, beat and wound, giving to the said Andrew J. Davis three mortal wounds

Mass.) in the City of St. Louis, on the first of June, 1840. By Thomas S. Nelson, a Member of the St. Louis Bar. Second edition. Boston, Published by Tuttle, Dennett & Chisholm, 1841."

"A full and accurate report of the Trial of William P. Darnes, on an indictment found by the Grand Jury of the County of St. Louis, at the September Term, 1840, of the Criminal Court of said county, on a charge of Manslaughter in the third degree, for the death of Andrew J. Davis, in the City of St. Louis on the First of June, 1840. Containing the Speeches of Peter H. Engle and Thomas T. Gantt, Esqs., Counsel for the Prosecution, and of Henry S. Geyer, Beverly Allen, and Joseph B. Crockett, Esqs., Counsel for the Traveller, together with the testimony of the State and Defendant's Witnesses, copiously given, and at full length; taken principally in short hand; By a Member of the St. Louis Bar. Saint Louis: to be had at all Booksellers. 1840."

"A Full and Accurate Report of the Trial of William P. Darnes, on an indictment found by the Grand Jury of St. Louis County, at the September Term, 1840, on a charge of manslaughter for the death of Andrew J. Davis, in St. Louis, on the 1st of June, 1840. Second Edition. Worcester, 1841."

The "member of the St. Louis Bar" who reported and printed this trial, THOMAS SOMERS NELSON, (1803-1879) was born in a small town near Dublin, Ireland, graduated at Trinity College, admitted to the Dublin Bar, and practiced law there until 1834, when he, at the solicitation of a friend, emigrated to America and settled at Clarks-ville, Pike Co., Mo. Attracted to St. Louis, in the early part of 1835, he entered upon the practice of his profession there and continued it until his death. In 1860, he was a member of the Common Council of St. Louis, and from 1862 until 1864, he was Recorder of Land Titles for Missouri, appointed to that office by Abraham Lincoln. He was a man of eloquence and learning, a master of seven languages and often referred to as "The Cicero of America."

"The Great West," by Richard Edwards and M. Hopewell, M. D.

"Personal Recollections." John F. Darby, St. Louis, G. I. Jones & Co., 1886.

"Life and Letters of Dr. William Beaumont," by Jesse S. Meyer, A. B., M. D., with an Introduction by Sir William Osler. St. Louis, C. V. Mosby Co., 1912.

* BOWLIN, JAMES BUTLER (1804-1874). Born Fredericksburg, Va. Admitted to Va. bar, 1826; removed to St. Louis, 1833; practiced law and edited the newspaper, *The Missouri Argus*. Clerk House of Representatives (Mo.). Member State Legislature 1836; District Atty. St. Louis, 1837; Judge St. Louis Criminal Court, 1838-1842;

of which said mortal wounds on the tenth day of June he died. And so William P. Darnes, the said Andrew J. Davis, in manner and form aforesaid, feloniously did kill and slay."

The prisoner being duly arraigned, pleaded not *guilty*, and the trial began today.

*Peter H. Engle*¹⁰ and *Thomas T. Gantt*¹¹ for the State.

Member of Congress, 1842-1848; United States Minister, New Granada, 1854; Commissioner to Paraguay, 1858. Died in St. Louis. See Bay, Bench & Bar of Mo.

¹⁰ ENGLE, PETER HILL. In the St. Louis Directory (1840-1841), there is this record:

"Engle, P. Hill. Commissioner to take the acknowledgment of deeds for the State of Pennsylvania, and attorney at law. Office 52 N. Second." The above indicates that he was originally from the State of Pennsylvania and likely a member of the Engle and Hill families of Germantown and thereabouts, prominent in their day and widely related.

"In 1840—or 1841—the Court of Common Pleas was established. Hon. P. H. Engle was its first judge. (p. 16) Walsh, "Address before the Circuit Clerks' and Recorders' Convention."

"At the time I was admitted to the Bar, (May, 1843) Peter Hill Engle (was) Judge of the Court of Common Pleas. Judge Peter Hill Engle soon after died and Montgomery Blair succeeded him as Judge of Common Pleas." Melvin L. Gray "Hist. Bench and Bar of Mo., A. J. D. Stewart." (p. 194)

The St. Louis Court Records contain this entry: "At a Term of the Court of Common Pleas begun and held in the City of St. Louis within and for the County of St. Louis on the Fourth Monday, being on the 22d day of February 1841, there were present HON. PETER H. ENGLE, Judge, etc." This was the first session of this court, but there is no entry of his Commission on the records nor is his Commission recorded in the books of the Circuit Court. The same Records of Dec. 22, 1843, have the following: "In consequence of the illness of the Judge, Court stands adjourned until tomorrow;" and the same entries are repeated on Dec. 23, 25, 29 and Jan. 1, 1844. On Jan. 9 is entered the COMMISSION OF MONTGOMERY BLAIR as Judge of this Court dated "JANUARY 9th, 1844" and signed by Governor Thomas Reynolds. The records indicate that the work of this court was very much behind, hence Engle must have been in failing health for some time. He apparently did not die in office.

"In February of this year (1844), Judge P. Hill Engle, for some years Judge of the Court of Common Pleas, died, after a lingering illness. He was a man of ability, and so amiable in his conduct of life, that he had the good fortune to make no enemies, and to disarm all prejudice. There was universal mourning at his death."

"A long train of sorrowing friends, yesterday, followed to the grave the remains of Hon. P. Hill Engle, late Judge of the St. Louis

Henry S. Geyer¹², Beverly Allen¹³ and Joseph B. Crockett¹⁴ for the prisoner.

Court of Common Pleas. Judge Engle died on Saturday morning (Feb. 17, 1844) about 4 o'clock, after an illness of many months. His death was announced in the Circuit Court immediately on the opening of that tribunal, and also in the Court of Common Pleas, and both courts adjourned. A meeting of the Bar then took place, in the Common Pleas Court room, H. S. Geyer in the chair, and T. Polk, Esq., Secretary. Resolutions were proposed and passed, providing for the appointment of a committee to report to an adjourned meeting, resolutions expressive of the feelings of the meeting on this melancholy occasion. The meeting which is to take place at the Court House this morning will show the estimate which they place upon the memory of a gentleman with whom they had intimate personal and professional relations for several years. His death may well be mourned by the community from which he has been called in the *mid-day of his life* and usefulness." Missouri Republican, Feb. 19, 1844.

"In the St. Louis Court of Common Pleas February 19th. At a meeting of the St. Louis Bar held at 10 o'clock a. m. on Monday, the 19th day of February 1844, the Committee reported the following preamble and resolutions: "The members of the St. Louis Bar assembled for the purpose of giving expression to their feelings, on the occasion of the death of P. Hill Engle one of their brethren, and late Judge of the St. Louis Court of Common Pleas, feel it a privilege to bear testimony to the esteem and respect with which they regarded the deceased, during his residence of *nearly five years among them*." Missouri Republican, Feb. 20, 1844.

The resolutions give no details of his life but pay a high tribute to him as a lawyer and judge.

¹¹ GANTT, THOMAS TASKER (1814-1889). Born Georgetown, D. C. Educated at Georgetown Academy and West Point. Studied law with Gov. Pratt of Md. Admitted to bar 1838 and removed to St. Louis 1839, where he practised for many years; City Counselor 1853; U. S. Dist. Atty. 1845-1849; Member State Constitutional Conventions, 1861, 1875; Judge Advocate 1861; Provost Marshal 1862; Judge St. Louis Court of Appeals, 1875-1877.

¹² See 2 Am. St. Tr. 206.

¹³ ALLEN, BEVERLY (1800-1845). Born Richmond, Va. Graduated Princeton. Removed to St. Louis, 1827; United States Dist. Atty. under President Adams; City Attorney, Member of City Council and Representative of St. Louis in Legislature. "His place in the front rank of the Bar was assured when he died at forty-five. He left behind him an unsullied reputation as a man, and as a lawyer he was one of those of whom the bar of St. Louis will always be proud. 88 Bay's Bench & Bar of Mo. 474-477.

¹⁴ CROCKETT, JOSEPH B. The St. Louis Directories from 1840 to 1851 describe him as "Attorney at Law." In those of 1851 and 1852 as "Editor *St. Louis Intelligencer*." After this his name does not

The following jurors were selected and sworn: Theron Barnum, foreman, Edward C. Putnam, Thomas Aspling, David W. Graham,

appear. These entries prove his residence and occupation in St. Louis during the years noted.

"In 1848 *The New Era* was established by Paschall & Ramsey. It was sold to Thomas Yeatman and J. B. Crockett and changed to *The Intelligencer*." Edwards' Great West, p. 179.

"*The Intelligencer* was another morning paper which lasted but a few years. It was started largely to afford George K. Budd a medium in which to discuss financial and commercial topics, the political features being left to J. B. Crockett." Missouri Historical Society Publications, No. 12 (1896). Newspapers and Newspaper people of Three Decades, William Hyde, p. 12.

The Prospectus of the St. Louis *Intelligencer*, Jan. 1, 1852, signed "Yeatman, Ramsey & Co." says: "The Editorial Department of which will be conducted by Joseph B. Crockett and in this issue on the editorial page Joseph B. Crockett issues a statement outlining his policies and headed: "To the Public'."

The Intelligencer, Jan. 6, 1852, mentions the presence in the city of Dr. G. F. H. Crockett who is on his way from Kentucky to Liberty, Clay County, Missouri to settle. He was probably a relative to Joseph B. Crockett and stopped over to see him. From this it would seem that Joseph B. came originally from Kentucky.

In the *Intelligencer* of Feb. 14, 1852 appears the first of a series of letters on the editorial page, written by Joseph B. Crockett while on his way from St. Louis, Mo., to San Francisco, California, and for some time after his arrival there. They appear at irregular intervals. The first is dated "New Orleans, Feb. 13, 1852 and begins: "Leaving St. Louis on the boat on the 6th ult (January 6, 1852) with my wife and four little children." He stopped at New Orleans for some time. By boat he went to Vera Cruz, thence to the City of Mexico, and on through Mexico to the sea coast where he took a vessel for San Francisco, the last being dated "San Francisco, California, February 28th, 1853" and appearing in the *Intelligencer* of April 9, 1853. They are replete with information gathered while on his way, and show him to be a man of keen observation and fine powers of *sound deduction*. His remarks concerning Mexico and the Mexican situation apply as well today as they did then. The data he gathered concerning early California is well worthy of being reprinted. His letters contain much concerning the early Missourians who went West and reached California, and the mention of many a tragedy which overwhelmed those who were crossing the Plains.

He located in San Francisco before 1856, for although not a member of the famous Vigilance Committee of that year (see 15 Am. St. Tr. 78), he headed a Committee of prominent citizens which was endeavoring to avert trouble between the Vigilance Committee and the Governor and his gang of political adherents.

See Popular Tribunals, "H. H. Bancroft, II-304, 308, 504, 505.

Timothy B. Edgar, Charles C. Hamilton, Alfred L. Norton, Robert Fowler, Edgar H. Gleim, Jacob A. Winters, Harry W. Chambers and William S. Bachman.

MR. GANTT'S OPENING.

Mr. Gantt. Gentlemen of the Jury: The present is a prosecution of Wm. P. Darnes for the crime of manslaughter in the third degree. This accusation against the prisoner we expect to sustain by the following evidence: That on the first day of June last, William P. Darnes armed himself with an iron cane and placed himself in the way to meet Davis, when the latter went to his dinner, at his usual boarding house. That he did meet him accordingly, that he accosted him, and with very little delay proceeded to assault him with his cane, the head of which was of lead, and of considerable size; that he struck first with the smaller end, that he then turned it and dealt him several violent blows on the head, fracturing and literally shivering the skull, and inflicting wounds of which Mr. Davis died on the 8th day.

This is the simplest possible statement of the case. I have avoided the mention of circumstances which will necessarily appear in evidence. But the establishment of the foregoing facts will abundantly establish the charge in the indictment, and fix upon the prisoner the crime charged therein upon him; which is the crime of manslaughter in the third degree.

If we shall prove these facts by the testimony we shall adduce, we will have made out our case, and your duty, gentlemen, will be to award to that crime the penalty prescribed by law—which is, imprisonment in the Penitentiary of the state, for a term not exceeding three nor less than two years.

The only objections to our present action, which have assumed a tangible substance and a visible form, are, that in substituting ourselves to the prosecutor, in the discharge of his duties, we are doing an officious act, one that savours of personal animosity to the criminal; that we are volunteers in the matter, not being retained to appear, by any one of the family or friends of the deceased, feeling an interest in the conviction of the accused.

Mr. Gantt explained that he and his colleagues were prosecuting the case at the request of the Circuit Attorney.¹⁵

Memoirs of General W. T. Sherman, (2nd ed. 1904) vol. I, 136-161. He became a judge of the Supreme Court of California in 1867 and retired in 1879. He died at Fruitvale, Cal., in Jan. 1884.

For the biographical notes to this trial, the editor is indebted to William Clark Breckenridge, Esq., of St. Louis.

¹⁵ BENT, JOHN (1803-1845). Born in Virginia; son of Silas Bent, Federal Judge in Missouri. Educated at Cannonsburg Coll. Pa. Admitted to Mo. Bar, 1825. Member State Legislature (1828) and Circuit Atty. St. Louis. Died in Callaway Co., Mo., from the overturning of a coach in which he was traveling.

The last mentioned seems to assume, that we might, with entire propriety, have appeared, if retained by any third person, and seems to proceed upon the unseemliness of a lawyer's doing any thing for which a fee is usually paid, *without* fee or reward. I disdain and repudiate such a doctrine; is there nothing which may admonish a lawyer, that he, in common with every member of society, has an interest in checking violent outrage and preserving order? Is there any indecorum in our doing, from considerations of the danger ensuing from the insulted and violated majesty of the laws, which guarantee to each citizen, life, liberty and the pursuit of happiness, that, which we might properly do in consideration of a fee? No, gentlemen, we are not here at the instance of any one who wishes to make us the vehicle of private resentment. Our stand is proudly elevated above the position to which such an arrangement would assign us. We appear as the advocates of insulted law; we feel no resentments against the prisoner, but an utter detestation of the crime which we believe he has committed; we appeal to the tribunal charged with the cognizance of criminal offenses, to inflict the punishment that may deter, and the remedy which may heal. We call upon that tribunal to hold the scales of Justice, with an equal hand and a steady eye. The question to be weighed, is one that must be decided upon considerations of strict right only. If a crime recognized as such by our statutes, has been committed; if that crime be fixed upon the prisoner at the bar, then it is immaterial what ulterior considerations might prompt you to wish that this cup might pass from his lips. Your sworn duty, your obligations as citizens concerned in the preservation of social order, as friends of law and interested in its preservation, all speak but one voice, and that voice is awfully distinct. Do your duty and let the consequences fall upon those who have recklessly, brutally and criminally violated the most fundamental laws of society, who have steeped their hands in the blood of their fellow-being, and who deny that doing so is a felonious homicide.

THE WITNESSES FOR THE STATE.

November 6.

Jeremiah Shea: At the *Argus* office met Mr. Davis coming down the stairs; met Mr. Hendry shortly after; he asked me if I saw Mr. Davis to tell him that he wanted to see him. On Third street saw Mr. Davis and Darnes talking. I was about a quarter of a square from them. Presently saw Darnes take his cane and strike Mr. Davis; Davis raised his umbrella; as Davis retreated Darnes clubbed his

cane and with both hands struck Davis over the head. Davis' hat fell off—two blows were then given; the umbrella was broken and fell to the ground. Afterwards saw Mr. Davis taken to the hotel; some persons cried out, "that's enough; don't strike him any more." When Davis was brought in Darnes tried to straighten his cane on his knee. Saw Grimsley to whom Darnes came up; Grimsley said, "get your knife ready, don't run."

XVI. AMERICAN STATE TRIALS.

Darnes said, "there's no run in me;" he opened his vest and showed the handle of his knife. Darnes straightened his cane when he came up to Grimsley.

The first blow was given by Darnes striking with the small end of the cane. Should imagine Davis was trying to keep the blows off with his umbrella—the umbrella was broken by the force. They seemed to be struck with all Darnes' force. Davis held the handle of the umbrella after the beating was over; can't say if Darnes struck after the umbrella was broken—the blows were aimed at Davis' head—every blow with the butt end of the cane was on Davis' head—on the back with the small end.

It was an iron cane; Darnes could not straighten it; it had a head of considerable size. Couldn't tell anything of Mr. Davis but what was becoming a gentleman; never knew him to be in a brawl or quarrel or to speak a hard word of anybody. Davis fell back a little and then Darnes took the butt end of the cane and struck him several times.

Cross-examined: Fight continued but a few seconds; went up to see the fight, not to interfere; it took place in the middle of Market street. Knew Mr. Davis as a boarder at the National Hotel for three years; am a waiter at the National.

Robidoux Annan: The day of the affray between one and two saw Mr. Darnes at the corner of the National Hotel; went over to Chapman's corner, half way a square, saw Mr. Davis coming from Chestnut street to Third, about a hundred yards before me. It flashed across me as I had read the *Argus* that some-

thing would take place. Stopped to see Mr. Davis reach the National. As he stepped from Market street from the curb Darnes stepped off from the opposite side; a conversation took place which lasted so long I was of opinion I was mistaken of any danger. As I turned to go to dinner saw Mr. Darnes strike Davis with his hand; Mr. Davis raised his umbrella; Darnes then struck with his cane several strokes—about eight or ten. Saw no other weapon with Davis but the umbrella, no attempt on Davis' part to get any other; was half the square off. The blows were aimed at the head; think no blows were dealt after Davis commenced staggering back.

Darnes is a man of more than ordinary muscular strength—his trade is a carpenter. He dealt the blows with all the force he possessed. The cane was perhaps about the size of Mr. Engle's thumb—about one-third the size of this cane (taking up the Judge's cane that lay on the bench.) As Mr. Darnes drew back his cane Mr. Davis raised his umbrella and struck at Darnes—can't say if Mr. Davis actually struck Mr. Darnes; he did not turn the umbrella so as to strike with the butt end. There were no blows dealt by Darnes after the staff of the umbrella was broken. I knew Mr. Davis for three years; he was a perfect gentleman, amiable, quiet and inoffensive; never knew him to be in a brawl. Darnes is a stronger man than Davis—the disparity, apparently, was great. Am positive Darnes struck the first blow; did not see Davis offer to make a blow—no menac-

ing gestures on his part before that.

Cross-examined: The blow by the hand by Darnes was the first blow. As I stepped off the sidewalk Davis fell back across the gutter; there were no blows struck after that time. Think the staff was broken by coming in contact with the cane. Have known Mr. Darnes for two or three years; never known him anything but a peaceable, quiet, orderly man.

Re-examined: Darnes has frequently passed my store; never knew him to carry a cane.

Charles Olborn: The day the affray happened saw Darnes about one or two standing about the National Hotel. From the *Argus* that morning thought there was something on the carpet; expected a row; I went away; returned and the affray was nearly over; the umbrella was broken and fell out of Davis' hand; saw several blows given. Mr. Amos took Davis into the National Hotel. Helped to undress Davis at the hospital. Am not positive if Darnes held a cane in his hand when I first saw him at the National Hotel. Saw two or three licks struck by Darnes. Davis couldn't see them as he was nearly blind; the blood was flowing over his face and eyes. Didn't see a whole umbrella in Davis' hand at all, it was so shattered as not to attract my attention. Davis did not offer to do anything during the two or three licks that I saw Darnes give him. He staggered, he offered no resistance and was incapable of offering any. Darnes struck with tolerable force with the smallest part of the cane in his hand. The blows were aimed

at and struck the head. Mr. Darnes was excited at that time; saw him after the affray, he seemed excited, pale and a little scary. Saw no one offer to part them; some called out not to touch them. Davis had a pistol which was taken out by some other person. The wound was dressed an hour and a half after Mr. Davis got to the hospital. Washing his head was the only operation I remember. Did not attempt to talk to him; did not know him. Was not apprehensive of a difficulty between Darnes and Davis as between Darnes and somebody else belonging to the *Argus*.

Augustus Kerr: Saw Darnes standing near the hotel door; went over to the hotel; saw the attention of the people about, drawn down the street and saw Mr. Davis coming up; at that moment went into the hotel and returned to the door; saw them in contact—Mr. Darnes and Davis were fighting. The blows were so quick did not observe the weapon of Mr. Darnes. Davis defended himself with an umbrella. Davis struck at Darnes repeatedly; do not know if he struck him. The weapon was not a dangerous one. Did not see Mr. Davis recoil; finally thought my impression wrong when I saw him stagger back; did not see blood until near the end of the affray; Mr. Amos ran in to interfere. Immediately afterwards Mr. Grimsley came out. Darnes appeared to desist towards the close, before Mr. Amos interfered—he did not strike in such quick succession. The blows were aimed at the side of the head; did not see which end of the weapon was

held by Darnes; thought it a riding whip; saw no mark of a blow on Darnes. Saw no appearance of Davis being injured until about two or three blows before the end, then saw blood. Davis held his umbrella to ward off the blows towards the end, the two or three last licks. Davis showed nothing like backing or retreating. The spots where the affray ended and where it began were eight or ten paces apart; Davis receded and Darnes advanced upon him. Did not know Mr. Davis. Mr. Darnes had more physical power than Mr. Davis. There were thirty or forty persons around when the affray commenced.

William H. Amos: At the National Hotel, saw Mr. Davis with his umbrella in both hands warding off Darnes' blows. When I arrived at the spot no more blows were struck. Ran up to Mr. Davis, he was bleeding very profusely; put my hand over the wound on the forehead. I helped him to a back room in the National Hotel and set him on a chair; remained with him until the physician arrived and helped to carry him to bed. I did not see the first of it; could not say how many blows Darnes struck Davis. When I came up Davis was in a helpless state, apart from Darnes and no offer was made then to strike him. The cane seemed to be an iron cane. I ran down the street at my utmost speed to part them. Davis was very much injured and I helped him on that account. Davis' hat was off, he shook his head up and down without offering any resistance. He had no spectacles on; have seen him with spectacles on frequently.

The wounds were on the forehead—I think three in number; the blood was flowing in a stream as thick as my finger.

Cross-examined: When I first passed the hotel I did not see either Davis or Darnes. It was near Mr. Paschall's that I first saw them fighting. The principal wound was on the front part of the head near the point of the hair. The size of the cane was that of a common walking iron cane; those canes usually have a leaden head. John Davis, Mr. Spurr, Mr. McLaughlin and I think Mr. B. W. Ayres, sat up with him the same night that I did. I had no conversation with Davis that night. I have nothing to do with the *Argus* office. It was on the third night that I sat up with Mr. Davis; he was trephined then.

John W. Spurr: Did not see the affray. When first I saw Mr. Davis he was near the hotel at the curbstone with the stick of the umbrella in his hand bleeding at the head, his hat was off; his spectacles were afterwards handed me by the barkeeper who said he picked them up on the street. Saw Mr. Darnes crossing the street, he had a bent cane in his hand about half an inch in diameter. Heard of a meditated attack on Davis from Mr. Charles F. Hendry, to be made by either Darnes or Grimsley. Was with him that morning, did not hear him say anything in anticipation of this attack. Knew the deceased intimately since 1833; his general character was that of a peaceable, quiet citizen. Never knew him in any disturbance. He was a native of Northborough, Massachusetts, and had resided

in St. Louis about four years. I led him into the house with Mr. Amos. Dr. Sykes arrived soon after and Dr. Beaumont was sent for and Mr. Davis was taken to the hospital. As soon as Dr. Beaumont could procure the instruments he was trephined. Was with him the greater part of the time until his death. He died on the 8th of June about six o'clock in the evening. On the first the blows were struck. His condition was insensible during the greater part of the time; the first three days he spoke but very little, afterwards he was speechless. He was afflicted with spasms and convulsions. Was present at the trephining. Dr. Beaumont, Dr. Sykes and Dr. McMartin were present. Dr. Beaumont used the instrument and Dr. Sykes assisted. There was a post mortem; I was present. The skull was very badly fractured in three different places. The physicians present were Doctors Beaumont, Sykes, Lott, McMartin, Brown, Adreon, Lorton and a German doctor. Dr. Meredith Martin was also present I think.

Cross-examined: I was employed in the *Argus* office; Mr. Davis was proprietor. Mr. Darnes was frequently at the *Argus* office. Mr. Davis did not usually carry arms; he had a pistol on the day of his death. I think he was bled and barley water was given and purgatives but no emetics. He had not vomited when he was taken to the hospital. The skull was depressed; there was no attempt made to raise the depressed part before the trephining was applied. Think Mr. Davis had his senses partly when the trephining was applied. Many persons visited him during his illness but not many talked to him. The pistol was in the outside pocket of his coat. Mr. Davis was not familiar with the use of firearms; never saw him fire a gun or pistol. William Gilpin was editor of the *Missouri Argus* at that time. Mr. Davis exercised no control over Mr. Gilpin in regard to the editorial matter; he did not generally see the editorials before they were put to press. Mr. Davis wrote editorials very seldom.

Mr. Geyer: Did not others write editorials for the *Argus* on the same subject?

Mr. Engle: Don't answer that question. (To the Court.) This is irrelevant; it may be a very good political manoeuvre, but it has nothing to do with the case.

Mr. Geyer: I do not wish any political manoeuvre. I did not invite the investigation, but to be candid with the gentleman, since it has been gone into, I will now pursue it. We expect to show that they were written by consultation, that Mr. Davis was badly advised. It is not right to let the real editors be concealed and not those whose names were on the paper be held responsible. For them to show that Mr. Davis wrote the article or knew that the article was written is relevant, but to attempt to show who else wrote it or to enter into any investigation as to what number of persons furnished editorials for the *Argus* at that or any other time, is irrelevant.

Mr. Allen: In law Mr. Davis was responsible for all the editorials

in his paper and was in fact in the eye of the law their author. Now if it can be shown that other persons than Mr. Gilpin wrote editorials it follows that Mr. Darnes could not know who wrote the article in question and that he could have recourse to no other person than Mr. Davis, the proprietor. If it is attempted to shield Mr. Davis by proving that Mr. Gilpin was editor it is certainly competent for us to show that there were other editors than Mr. Gilpin and that Mr. Davis then could alone be held responsible.

THE COURT: I think as Mr. Gilpin's name was announced at the head of the paper as editor he and Davis alone were responsible. I do not think the question whether other persons also wrote editorials is altogether relevant, because no matter who actually wrote the editorials, they appear in the paper under the name of the editor, and he and Davis, the proprietor, were responsible for them. The question should be overruled as having no bearing on the case.

Mr. Allen: Suppose I was the author of the article in question, would I not be responsible?

THE COURT: Yes, and Mr. Gilpin too.

Nathaniel Philips: Recollect selling Mr. Darnes a cane the same day the affray took place, about eleven o'clock in the morning. He inquired for a hickory cane—said he did not want an expensive one. Sowed him a variety of canes. There was another gentleman purchasing a cane, a steel one, and he remarked to Mr. Darnes that a steel cane was a good substitute for a hickory. Darnes took a cane and remarked he thought it would answer his purpose. He took the iron cane with him and left. The cane had a head to it about three-quarters of an inch in diameter; the head was composed of lead thinly covered with paper and gut.

Cross-examined: I keep a large assortment of canes. Darnes did not ask for a steel cane. The hickories were of various sizes; there were sword-canes among them. The person who recommended the iron cane was a stranger—they did not appear to be acquainted. The rod was about three-sixteenths of an inch in diameter but thickened with

paper on top—the thickness diminishes downwards. The cane was about five-eighths of an inch thick just below the iron head.

Charles F. Hendry: About ten o'clock saw Mr. Darnes standing at the National Hotel with a cane in his hand; he looked troubled and anxious. Later saw Darnes at the National. Previously heard something of a difficulty. Mr. Grimsley took Darnes' arm and led him to the window of the bar of the National Hotel. Hearing in their conversation a remark of what was going to take place, immediately hastened down street and wrote a note to Mr. Davis at the store. Invited Mr. Davis to dine with me and stated my reasons for doing so; that I had seen Mr. Darnes and his friend at the hotel and he told me he intended to chastise him. I read the piece in the *Argus* very early on Saturday morning; afterwards saw Mr. Darnes in Mr. Bayfield's store; remarked to him, "Mr. Darnes, the *Argus* has used you pretty rough this morning." He laughed and said he had read it

or wished to read it. Met him Monday morning in the barber's shop, some remark was made relative to the piece in the *Argus* of Saturday. Remarked to Mr. Darnes, "I suppose you will hold Mr. Gilpin responsible for that." He said, "No, I intend to hold Mr. Davis responsible for the piece." Asked him, "Why not Gilpin?" He said the reason was he did not consider Gilpin a man of any character or standing and considered Mr. Davis the only man responsible as being the proprietor. Remarked to him that I thought Mr. Davis innocent. Then said that I thought Darnes was afraid to fight Mr. Gilpin. Darnes asked me if I wished to take it up. Knew from the remark of Mr. Darnes that Grimsley was a backer of Darnes because he said that if he was afraid to fight Mr. Gilpin, Mr. Grimsley was not. When I wrote the note, started for the *Argus* office, met Shea, told him if he saw Mr. Davis to tell him to call at my store. Met Mr. Spurr also and told him to tell Mr. Davis that Darnes was about to chastise him. Went to my store then and saw a crowd when I came in sight of the National. Saw Darnes about five feet from the curb with the bent cane in his hand looking very pale and frightened. Went into the hotel where Davis lay, with Mr. Amos holding his head. Went for Dr. McMartin and on my return met Darnes at the hotel door. I said, "Darnes, you have killed that man." Darnes said, "I don't care a damn if I have, I have got my revenge." After dinner Mr. Davis was removed to another room and from thence to the hospital. Helped to take

off his clothes. Called to see him afterwards but did not speak to him. Saw Darnes on Saturday morning at Bayfield's store. Did not think on Saturday or Sunday from what I heard from Darnes that he meant anything further than a threat. Myself and Mr. Darnes were friends, members of the Lyceum.

Cross-examined: Was well acquainted with Davis. Mr. Davis and Mr. Darnes were intimate with each other, members of the Lyceum. Never had any occasion to hear them speak in high terms of each other. The threat was in the conversation at the barber's shop. Advised him to prosecute for defamation of character. Mr. Darnes is not habitually profane and do not know that he used the word "damn." I thought at the time it was because he was excited. Have heard him regret Mr. Davis' death. Was examined the next day before the justices. Have had a difficulty with Mr. Darnes; thought it was all made up. The cane was not very large, such as gentlemen carry to church on Sundays, such as are known to the jury and almost everybody. The cane I carry is steel with an ivory head. In my difficulty with Mr. Darnes I did not attempt to use it.

November 7.

Doctor Thomas McMartin: Am a practicing physician; was called to see Mr. Davis; found him in a room in the National Hotel with six or seven friends about him, with wet cloths, holding them to his head. The hemorrhage had ceased; then discovered there were three fractures in the head; one of these in medical jurisprudence is

called a fracture, in surgery a fissure. Mr. Davis was then removed to another room and laid upon a bed. Then discovered another fracture above the left ear. Dr. Sykes arrived and examined the injuries; the first injury was upon the forehead, upon the prominentia frontalis or a little above it—a compound fracture is where the integuments are also broken; a simple fracture is one where the integuments are not broken through; it was also a pointed fracture, one where the center of the depression is pointed or lower than the margin. The fracture was about one-half or three-fourths of an inch in diameter. The next was the fissure, near the medial line of the forehead, a mere crack in the bone without depression, about one inch from the first described. The integuments and muscles were all broken through; the hair was driven in through the fissure and held in it; in withdrawing the hair it broke. The next fracture was upon the left temple—all were upon the left side of the head. This was very complicated, the skin was not completely broken through but it was very much thinned and contused. The temporal muscle below it was completely broken down by the force of the blow; the skull was also broken and depressed. The skull at the temple and the orbital process of the frontal bone was broken through and the great wing of the sphenoid bone was included in the fracture. The anterior inferior process of the parietal bone was also broken.

He was removed to the hospital and Dr. Beaumont was sent

for that a full consultation might be had as to the propriety of further steps. No operation was performed till Dr. Beaumont arrived. An operation to elevate the depressed portion of the skull was determined upon when Dr. Beaumont arrived. The operation for elevating the bone on the temple was first performed; the integuments had been previously partially incised by Dr. Sykes and a space was now laid bare for the application of the trephine. The trephine was applied above the fracture, over or on the outside nearer the crown of the head and a little anterior to it.

He had been bled copiously. I saw him daily till his death; he was attended also by Doctors Beaumont and Sykes. Dr. Beaumont is reputed an eminent surgeon; he has been known to me personally for about a year and a half; he had been known to me previously by reputation; was reputed to be the curer of a very wonderful case, the case of a shot-gun wound in the stomach, and as having made some curious and interesting experiments on digestion. Know no other man in Missouri who enjoys a higher reputation for surgical talent. Was present at the post-mortem. Doctors Beaumont, Sykes, Adreon, Brown Lott, a German doctor, and others who were strangers to me, were present. The fact that the obitar process of the frontal bone was broken was unknown until after the post-mortem. There was also a fissure extending from the fracture in the temple to the fracture above the ear; a number of spicula of bone was discovered lying on

the brain. The dura matter was completely broken down by inflammation or suppuration under the first fracture I described, and there the spicula were on the brain; the brain was completely disorganized. The dura matter was thickened and inflamed but not disorganized. The inflammation under the fracture above the ear was slight. There was a small quantity of water in the lateral ventricles of the brain; a considerable quantity of coagulated blood between the dura matter and the skull extending from the fracture on the skull backwards two or three inches. I could not approach near enough to examine the artery to see if it was ruptured or not. Did not see any spicula of bones driven into the brain.

All wounds of the skull are dangerous; compound fractures are more dangerous than simple ones. Severe contusions of the temporal muscles without injury to the skull are also dangerous; injuries near the base of the skull are more dangerous than at the top of the head. The danger is greatly increased when those injuries are multiplied. Mr. Davis died of inflammation of the brain produced by the injuries; I know of no course of surgical or medical treatment which could have saved his life.

Cross-examined: The operation of trephining requires care; a careless operator would put his patient in great danger. Know of no case on record dangerous where a man died from trephining when no injury is done to the skull. Trephining does not necessarily superinduce inflammation of the membranes of the brain. Have read one case

of a man having been trephined twenty-seven times and yet he lived. The only danger is in driving the trephine on the brain or injuring the dura matter; simple fractures of the cranium do not call loudly for trephining. Sir Astley Cooper does not trephine in simple fractures where there is no symptom of compression. In all cases of compound fracture he elevates the skull; he says he uses the elevator or Hays' saw, rarely the trephine. Sir Astley Cooper is the greatest of living surgeons. In simple fractures he advises that the trephine should not be used through fear of causing compound fracture, as the use of it has a tendency to produce inflammation of the brain. The admission of the air also he says has a tendency to produce inflammation. The fact of the perforation of the dura matter does not render the perforation of the pia matter also necessary. It is not usual to close the wound after trephining without examining if there were any spicula on the dura matter. All the spicula that were discovered were removed, others found after his death.

Dr. Sykes: Am a practicing physician. Was called to examine the wounds of Andrew J. Davis; was at the National Hotel about two o'clock; saw Mr. Davis in bed; Dr. McMartin was with him. (Witness described the wounds like the former witness.) From the first considered the trephine alone could save Mr. Davis. Before he was removed to the hospital sent for Dr. Beaumont in order to get the best surgical assistance that I knew of. Dr. Beaumont arrived

and examined the wounds at the hospital and upon a full and free consultation of the case between Dr. Beaumont, Dr. McMartin and myself, we determined to apply the trephine. (Witness described the operation, etc., as had Dr. McMartin.)

There was a post-mortem examination, at my instance, held; there were present the three attendant physicians, Dr. Brown, Dr. Meredith Martin, a German physician, Dr. Lott, Dr. Lorton, Dr. Adreon and six or seven gentlemen. The inflammation was produced by the wounds described. The wounds were dangerous and mortal; so considered them before his death. The fractures were found greater from the post-mortem examination than we could know before. The post-mortem examination went to show that the trephine should be applied; think that no course of medical or surgical treatment could have saved his life; I think the best treatment was adopted.¹⁶

Cross - examined: The post mortem extended to no other part than the head; there was plenty of light in the room when the trephine was applied; I made the dissection and Dr. Beaumont applied the trephine. The medical gentlemen who attended the post-mortem were invited by me; they were respectable, intelligent men in the profession. The German doctor was

not invited by me; he came there and requested to be present. Dr. Lorton was not invited by me; I invited Dr. Martin, Dr. Brown, Dr. Carpenter, who was not present, Dr. Adreon and Dr. Lott. I asked Dr. Brown as a friend; he is a surgeon-dentist. I selected these gentlemen because it was my pleasure. The invitation was given not from any complaints of treatment Mr. Davis received, but to witness such an examination as usual. I heard a great deal of impertinence about the case. Visited Mr. Darnes in jail a number of times as a matter of kindness. Mr. Darnes introduced the subject of Mr. Davis' death. Told him that the rumors that were afloat were unfounded.

I cleansed the skull that was produced and have kept it in my possession since. Have showed it to medical men as a fracture of great extent. It never was out of my office until today.

Mr. Davis was in his senses but in a dreamy state; he did not complain when the trephine was applied. His case was peculiar, *sui generis*, no such case in the books, no parallel, no precedent: the pieces of the bone were taken out with the finger and with the forceps.

Edward Walker: Had some conversation with Mr. Darnes on the day of Mr. Davis' death. Asked Darnes what he intended to do with Mr. Gilpin relative to

¹⁶ Here a part of the skull of the deceased—about the half—was produced, wrapped in paper, by Mr. Engle who uncovered it and handed it to Dr. Sykes. There was an intense sensation upon its production and as the witness proceeded to describe the fractures on the skull and the pieces taken out, both before and after the post mortem examination, the jury all crowded around him and the officers and the whole audience arose and assembled, as many as could, inside the bar to hear the explanation.

the publication in the *Argus*; he said he did not know whether he should do anything with him or not. Told him I thought he ought to give him a d——d good flogging. Darnes had a cane in his hand and I asked him what he was going to do with it; he said he was going to flog or whip a fellow and wanted me to go away from there. Passed across to the National Hotel and after remaining about five minutes crossed the street again to where Darnes was standing; asked him again what he intended to do with Gilpin relative to the publication in the *Argus*. He said he did not know what he should

do or that he would do anything. He told me he did not want me to go away from there. Told him that I should be back in a few minutes. When I returned saw a great crowd near the door of the National Hotel. Went up to see what was going on. Mr. Davis was bleeding furiously; Mr. Amos had his hand to his head. Captain Grimsley and myself met at the corner of Market street at the museum and we came up to where Mr. Darnes was. Captain Grimsley observed to Mr. Darnes that the cane was not worth a d——n, that it would break in three or four pieces the first stroke he gave with it.¹⁷

MR. ALLEN'S SPEECH FOR THE PRISONER.

Mr. Allen: The present is a painful occasion to all those concerned in it. The death of Mr. Davis was a painful and melancholy occurrence and aside from the bare possibility of suffering a legal penalty, no person regrets that catastrophe more sincerely than my client himself; but in addition to that Mr. Darnes must bear the pain of hearing the testimony that has been adduced upon the trial, as well as the humiliation of being brought here and tried for a crime, which is in itself most painful. To us, who are called upon to defend him from so serious a charge, the task is also painful; and to you gentlemen of the jury, who have to sit and decide upon his case, I have no doubt it is also a painful duty; but we have all those pains to bear patiently, from the necessity of the circumstances that compels us. Mr. Gantt, in his remarks, took a great deal of pains to vindicate himself and the position which he occupied, as prosecutor; he said that he and his colleague were

¹⁷ Dr. Beaumont not being in Court it was agreed between counsel that Mr. Allen should open the defense and Dr. Beaumont's testimony be taken afterwards. It was also agreed that Sir Astley Cooper's lectures should be received not only as authority but as good testimony.

not retained by the friends of Mr. Davis. but that they appeared as disinterested counsel, for the public good alone, without fee or reward, as lovers of public order; that he himself was the bearer of a note from Mr. Carroll to Mr. Gilpin, which looked to a hostile meeting, and which was occasioned by those same articles that produced this difficulty. Was this done for peace? If the answer had been different from what it was, Mr. Gantt might have been second in a duel, and had such been the result and death followed to one or both of the parties, what now would be the position of Mr. Gantt? Why, in the eye of conscience, he would be guilty of Mr. Gilpin's death if he was killed. Does this then look like a love of public peace and good order? But the counsel for the prosecution claim also to be entirely disinterested, and that they appear in this case merely from the love of justice. But, gentlemen, can you possibly believe that if the picture was reversed, those gentlemen would have been here to prosecute? Suppose that Mr. Davis, who, it has been proved to you, was armed with a pistol, had shot Darnes in the affray, do you suppose that Mr. Engle and Mr. Gantt, with all their love of law and justice and order, would appear as prosecutors against Davis? I believe, most religiously, they would not; and if they are the lovers of order and peace, that they would fain represent themselves, and have no ill will against Mr. Darnes as they say, how came it to pass, that he was threatened with mob law before the justices; that he was told, when replying to some insulting remarks in the justices' office, that unless he "*shut up*" he would be lynched? They appear, if for nothing else, at least for the love of fame; have they not the ambition and the pride of hoped-for success? Have they not the expectation of fame in the condemnation of Darnes? And do not day-dreams of glory flit across their vision, from the hope of his conviction? and do they not expect to wreath their brows with laurels plucked from the grave of Davis?

Mr. Gantt said that the Circuit Attorney had resigned the case to them and had avowed his incompetency to prose-

cute it. I will explain that to you. When the case was called on, at the September Term of the Court, a difficulty arose with regard to the indictment; it was considered by the Court radically defective and incapable of amendment by consent, although in the opinion of an eminent counsel in the city, not engaged in the case, the indictment was good. Mr. Bent then said that if his indictment was bad he was incompetent to draw a good one. It was then that Mr. Gantt rose in open court and volunteered an opinion, that the indictment was obviously not a good one, thus seeming to solicit a connection with the case. Mr. Bent, seeing this officious interference, and the excited feelings of gentlemen in the matter, and having an election immediately before him, in which he was a candidate before the people for re-election, felt the delicacy of his situation and requested them to take charge of the case; and it was thus that the gentlemen extorted a request from him, that they would relieve him from its management.

But, gentlemen of the Jury, these law and order loving gentlemen, the counsel, prosecuting in this case, prosecute in violation of law; the Circuit Attorney is the only person that the law recognizes, as authorized to prosecute individuals for the crime laid to their charge—he is obliged to take an oath, that he will support the constitution, and that he will faithfully demean himself in office, and he is liable to be punished for misdemeanor in office. This provision of the law throws a shield around the accused, and saves him from being made the victim of personal enmity; but what security has the defendant in this case? The obligation of an oath is not imposed upon the present prosecutors—they have no such restraint upon them to constitute the shield of the accused. The oath of the Prosecuting Attorney is frequently the prisoner's best safeguard.

The circumstances of the case are these: An article appeared in the *Argus* of the 30th of May, of such an offensive character that Mr. Darnes required an explanation of it from Mr. Davis, through the medium of Captain Grimsley. This is the article:

"JAMES J. PURDY.—We are expressly requested by Mr. Purdy to state that his name has been *fraudulently* used by the federalists and placed on their National Bank Committee without his KNOWLEDGE, authority, or consent.

"Mr. Purdy is and has always been opposed to a National Bank, on the ground that no power to incorporate such an institution exists in Congress, or has been delegated by the people. The only constitutional bank that meets the sanction of his judgment, is the 'BANK of INDUSTRY.' A word about this Bank movement. Nothing that has yet occurred in the present contest more clearly proves the *dunghill breed* of the federalists than this movement, and the toadies made use of, to play off the game. We shall have a word more to say in the matter."

The following is the note which Mr. Grimsley handed to Mr. Davis, requesting an explanation of this article:

"To Andrew Jackson Davis, Esq.,

"Sir, noticing in this morning's *Argus* some remarks which I think is intended to be applied to me with others, and from the following head (Published daily by Andrew Jackson Davis) I consider you the only person to be held responsible for what appears in that paper, as the Editor's standing in my opinion for moral integrity and veracity forbid that I should have any communication with him, therefore, sir, I wish you to inform me by the bearer Captain Grimsley if the following language was intended to be applied to me directly or indirectly in any shape, manner or form "A word about this Bank movement. Nothing more clearly proves the *dunghill* breed of the federalists than *this* movement and the toadies made use of, to play off the game."

"Respectfully,

"W. P. DARNES.

"St. Louis, May 30, 1840."

This article was the origin of the catastrophe. Nothing could be more respectful than the note of Darnes to Davis, written as it was, to ask explanation of such language as that used in the *Argus*, "the dunghill breed of the Federalists", "the toadies made use of." This was the very piece, on account of which Mr. Carroll thought he had a right to call on Mr. Gilpin, by Mr. Gantt, for an explanation. Well, there was no answer sent by Davis to this respectful letter of Mr. Darnes; although I think we shall be able to show you, that Davis at first thought of returning a friendly answer to it, but was prevented by his friends; but the following letter to Mr. Grimsley, the bearer of Mr. Darnes' note, was

sent in reply, and was delivered to Mr. Grimsley by Mr. Hudson :

"St. Louis, May 30, 1840.

"To Thornton Grimsley, Esq.

"Sir—From the character of the author and of the contents of the letter which you handed me this afternoon, it is entitled to no notice or reply from me.

"I therefore inclose it to you, to be disposed of as you may think proper.

Yours, respectfully,

"ANDREW J. DAVIS."

Such was Mr. Davis' letter in reply to the friendly letter sent him by Mr. Darnes; and, gentlemen, I ask you to look at the language of that answer—"from the character of the author"—Why, what was the character of the author? Was it not such as entitled him to the friendship of Mr. Davis himself, the man who wrote this note? Were not Darnes and Davis friendly? Were they not associated together? Did not Darnes visit Mr. Davis in his office? And how came it to pass then, that Mr. Davis in his answer could say, "from the character of the author." Is it not manifest that Davis was urged on to write this note, and that it was not the production of his own free will? But look again at the answer and let us see what it says further—"from the character of the author, and of the contents of the letter,"—why, what are the contents of the letter?—are they not respectful, are they not moderate, are they not such as one gentleman would use towards another, in asking for an explanation of an offensive publication? I say they are, and that nothing disrespectful or offensive can be found in the entire letter. But the next circumstance, we find, is an article in the *Argus*, on the 1st of June, the Monday following, which I shall read to you:—

"A fellow by the name of w. p. darnes, a common street loafer and vagabond, and fit subject for the "vagrant act," had the impudence, on Saturday last, to send a note, by Thornton Grimsley, to the proprietor of the "*Argus*," Andrew J. Davis, asking from *him* the meaning of certain phrases of ours, which appeared in the paper of that morning.

"The blackguard style in which the note was couched, and the degraded character of the fellow who had put his name to it as the author, rendered it necessary, of course, that it should be re-

turned to Mr. Grimsley without a reply. None but a jackass or poltroon would think of calling for explanations of the meaning of an article, deemed offensive, except by making application to its known and acknowledged author.

"Mr. Davis is of course no more competent to give the meaning or intention of *our* article than any other equally intelligent individual. This half witted drone, who stands at the corners, or roams about the streets, without employment, and without seeking it, and without any visible means of support, is a fit *toady* for the little clique of Federalists with chambers at their head, to hiss on to the sending of threatening letters, which they themselves do not venture to underwrite. The editor of this paper is William Gilpin, as is apparent upon its face, and he holds himself responsible for all that appears in the Argus as *editorial*. He can generally be found at the office, on Olive street, and on any particular business of the kind from *gentlemen*, he will make it a point not to be absent."

In this piece, Mr. Darnes' initials are printed with small letters for the sake of contempt; but will any man believe that Davis did not see this article before it appeared in the paper? Darnes said, in his letter, that he would not recognize Gilpin at all, but that he would hold Davis responsible. How did Gilpin come to know this, except that it was told him by Davis? And it is not the natural and just conclusion, from this fact, that Davis furnished all the material for Gilpin's editorial—that article must have been written by the procurement of Mr. Davis; Mr. Gilpin was merely the agent of Davis, and Davis was responsible for all the acts of his agent; he was the sole proprietor and had full control over the press, and could prevent any editorial, or article, or even advertisement from going into the paper; he should have cut the nib of Gilpin's pen before he allowed him to write such an article; the press was his own and he had the power to do so; but yet he did not stop him, and from this I have a right to conclude that the piece appeared with the connivance and procurement of Davis. What then was the position of Mr. Darnes? He stands accused in the public press, and he makes application to the proprietor of that press, his particular friend, for an explanation; but does he receive an explanation? Not at all; on the contrary, Mr. Davis refuses him even a civil answer, and furnishes matter for a gross and abusive editorial to Gilpin; that article calls him an ass,

a vagabond, a loafer, a fit subject for the penitentiary, and is circulated far and wide, among the subscribers of the newspaper. No man, without the aid of religion, but would seek redress under such accumulated injury. Peaceable a man as old Benjamin Franklin was, he says that club law is the only remedy when the Press becomes licentious, and that it is right to chastise the publishers. In this case, Darnes is called various evil names; he is provoked by Mr. Davis; his name had become a by-word in the public streets. Mr. Annan said, that from the scurrilous piece in the *Argus*, he expected that there would be some difficulty—that Darnes would chastise Davis; so said Mr. Olborn and also Mr. Kerr—the community at large felt that it ought to be punished; and it was the general expectation that an affray would take place. Others said that Davis should control Gilpin, or that he himself would be held responsible.

But would a civil action against Mr. Davis, for a libel, be of any avail?—by no means; there has been no one convicted of a libel, within my knowledge, in this county; and the prevailing feeling fostered among the community is, not to prosecute for a libel, but to chastise the libeler. In this case, Mr. Darnes was compelled by the force of public opinion, to punish Davis; he was under a moral duress to chastise him; and when he did undertake to execute that which public opinion rendered imperative upon him, we will show you, satisfactorily, in accordance with the averment in the indictment, that his intention was only to chastise and not to kill Davis—because, what does Darnes do? He goes in search of Davis; he is seen by Mr. Annan, at the National Hotel, looking for him; and Annan testifies, that when he first sees Davis, he only speaks to him—he accosts him—there is no scuffle at first, there is no fight; on the contrary, the demeanor of Darnes is such, and the conversation between him and Davis continues so long, that Mr. Annan thought he was mistaken in his fear of any danger, and was about to proceed on his way to dinner: and is it not a fair conclusion to come to, that if Davis had given a civil answer to Mr. Darnes on that occasion—if he had given him such an explanation as he was justly and

reasonably entitled to, there would have been no fight, and consequently no death? What Darnes sought was a peaceful explanation, and if Davis had then told him, that he did not authorize the scurrilous publication in his paper and acknowledged Darnes to be a gentleman, there would have been no difficulty and Darnes would have been satisfied. Is it not a fair supposition then, that instead of an explanation, such as was sought for, and such as in all reason ought to have been given, some provoking language must have been used by Mr. Davis? We have no means of knowing what the conversation between them actually was; we cannot prove the language made use of on the occasion, because there was no other person present to hear it; but the only just inference that you can draw from the length of the conversation is, that some new provocation was given, some additional insult was heaped upon Darnes, which suddenly excited his feelings already smarting under a sense of the grossest injury, and compelled him to strike Davis; and in this case he is only guilty, under the law of the State of Missouri, of excusable homicide, or at most, of manslaughter in the fourth degree.

But I shall show you, gentlemen, from the testimony, that it was from the treatment of his wounds, and not from any injury inflicted by Mr. Darnes, that Davis must have died, or at least that such doubt must exist in the minds of the Jury on that point, that the defendant is entitled to the benefit of that doubt, and cannot be convicted of the offence as laid in the indictment. The indictment alleges, that it was done in the heat of passion, if done at all; it admits that there was no intention to kill, on the part of Mr. Darnes, and, consequently, there can be no conviction higher than manslaughter in the third degree; but it is competent for the Jury, although they cannot go higher than manslaughter in the third degree, to go below that degree, and to find in the fourth degree, or to find that the act was excusable homicide, and acquit the defendant:—And, the indictment alleges that the killing was effected with a dangerous weapon—now, if it can be shown, that the weapon was not a dangerous one, the defendant cannot be guilty of manslaughter in the

third degree, as charged in the indictment. I will show you that the instrument used by Darnes, in chastising Davis, was not a weapon at all—that a cane, such as that used by Mr. Darnes is not a weapon such as the law contemplates—because, let us enquire what is a weapon—a bodkin is not a weapon, nor a pair of scissors; nor a pen-knife, nor a shears, nor a yard-stick—a weapon means an instrument made and fitted for combat. A common hickory walking-cane, such as Judge Bowlin uses, or the stick, which Mr. Gilpin carries, is a weapon rather than the cane used by Mr. Darnes. No one would call an ivory headed cane a weapon, and the difference between a cane with a leaden head, and one with an ivory head, does not make the former a weapon. A cane cannot be a weapon in the eye of the law. The law authorities speak of pistols, daggers, guns and swords, as weapons, something that is used in combat; but they say nothing of such canes as Mr. Hendry says, dandies carry to church with them on Sunday, or such as Mr. Phillips calls fashionable walking canes. A sword-cane is a dangerous weapon, because it is an instrument used for offence or defence; but a cane, no thicker than a pencil-case, is not so much a weapon as an umbrella, the handle of which may have been of hickory—and yet no person would call an umbrella, a weapon. Mr. Phillips says, that the cane, bought by Mr. Darnes, was a cheap one, not an expensive cane, such as Mr. Hendry carries, when he goes to church—and this proves to you, that it was the cost of the cane, not the size or dangerous character of it that Darnes consulted, when he made the selection.

But suppose, for the sake of argument, that this cane, the size of a pencil-case was a weapon, still it cannot be called in the language of the indictment, a dangerous one—a dangerous weapon is one, from the use of which, death is likely to ensue—dangerous is synonymous with deadly. There is no definition in law to show what is the exact meaning of the expression “dangerous instrument.” The mere fact that death might ensue from the use of a weapon, does not render it a dangerous weapon—a pen-knife may produce death, yet no one would ever think of calling a pen-knife a dangerous

weapon. A clerk, in a store, in a fit of passion, may strike a customer with a hickory yard stick, in such a manner as to cause death, and yet a yard-stick would not be called a dangerous weapon; still, by a blow in a particular place, death may ensue from the use of such an instrument—yet it is not a dangerous weapon, because it never was intended as a weapon of offence, nor as an instrument to effect death.

The fifth section of the second article, Crimes and Punishments, reads as follows: "Homicide shall be deemed excusable, when committed by accident or misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon sudden combat, without any undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel and unusual manner." If the homicide be committed by accident or misfortune, such as for instance, if a carpenter in throwing lumber from the window of a house in which he is at work, and into a street where there is not much recourse of persons passing and repassing, kills a person, or if a man uses a hatchet, the head of which flies off and kills one near at hand, such homicide is excusable, because unattended with any degree of malice whatever; but the language of the indictment is, "without design to effect death;" it admits that Davis' death was effected in the heat of passion and without design: this is still stronger than the cases which I have mentioned, and if in them the homicide was excusable, much more must it be when, in the language of the indictment, it was committed in the heat of passion as well as without design to effect death. But was it done on sufficient and sudden provocation? The provocation here meant, is not that provocation which would justify one man killing another; it is the provocation sufficient to raise the heat of passion; the word "sufficient" in the law, is solely applicable to the expression "in the heat of passion" immediately preceding it, and has no reference to the killing; and, with this interpretation, had not Mr. Darnes, I ask you, sufficient provocation to excite in him the heat of passion? Look at the circumstances of the case; the low, scurrilous epithets applied to him in the piece in the newspaper; see

him then applying to Mr. Davis, his friend, for an explanation of this article; see him conversing with his friend—and I ask you, is it not the reasonable and just conclusion, that Davis, when he asked for explanation, refused it in such a manner as to excite the heat of passion in Mr. Darnes?

Was it then done in a cruel and unusual manner? The manner was not unusual, because the manner of using a cane in such circumstances is to strike with it—and the indictment negatives that it was done in a cruel manner, because it says it was done without a design to effect death—besides it may be done with sufficient force to effect death, and yet the manner may not be cruel. All the witnesses testify that the cane was used with rapidity. Mr. Amos says, that he had gone only as far as Mr. Paschall's house, and when he saw the fight, he ran back, and yet it was over before he got there. Mr. Kerr says that Darnes desisted when he thought he hurt Davis; this appears from the testimony of Mr. Amos, of Mr. Kerr, and Mr. Annan. The whole evidence goes to show that it was Darnes' intention to chastise Davis; there was then no cruelty here, for Darnes desisted the moment that Davis staggered back, and because the instrument used was merely a cane, or as some of the witnesses thought, a riding-whip or switch. The testimony also to be introduced in defense, especially that of Mr. Simons, and of Major Wetmore, will satisfy you, that upon Darnes slapping Davis on the face, both parties struck each other in quick succession, Davis with his umbrella in both hands, and Darnes striking with the cane only in one hand. Other witnesses also will testify to the same thing, and will prove that there was a combat between them, and that Darnes desisted the moment he saw Mr. Davis was hurt. Chastisement then was the only object of Mr. Darnes, and the homicide that unfortunately occurred was occasioned by accident, from a weapon not in itself dangerous,—from the fact that the moment Mr. Darnes saw that Mr. Davis was hurt and then instantly desisted, as has been testified to you by the witnesses on behalf of the State, and as we shall abundantly prove to you by other testimony, is it not clear that it was mercy and compassion towards Mr.

Davis and not cruelty that existed in the heart of Darnes? If then we show that this homicide was committed without design to effect death, intending only to chastise, and with a weapon not dangerous, with sudden provocation, in the heat of passion, and not by means cruel or unusual, the defendant is not guilty of manslaughter in the third or fourth degree, but only of excusable homicide, because the killing was involuntary, or at most, it can amount to no more than manslaughter in the fourth degree.

(*Mr. Allen* again referred to the statutes and read extracts from the different sections applicable to the case, and commented upon them, concluding, at the close of his reasoning, with the deduction that the defendant was not guilty of manslaughter in either of the degrees mentioned, but only of excusable homicide.)

Suppose that Mr. Davis had been cow-hided by Mr. Darnes and that he had shot him, you would not convict Davis; but it is shown that Davis was armed, and we expect to prove further that he showed his pistol, and said he expected an attack, and that he would show them whether he would run. Darnes believed such to be the fact, and therefore, it was, that he provided himself with a cane. Davis' motion with his hand also induced Darnes to believe, that he intended using his pistol: they were, therefore, upon an equality; Davis had a pistol and an umbrella, and was equally as well armed as Darnes. Here then, was a sudden combat, with no unfair advantage taken; and if, under those circumstances, the crime would be reduced in England from murder to manslaughter, here, in this country, where the law is more lenient, and regards the frailty of human nature more tenderly, it can be deemed only excusable homicide, or at the most, manslaughter in the fourth degree. From the many observations on the extent of the wounds, the injury of the head, of the skull, of the dura mater, they intended, I suppose, to prove that it was done in a cruel manner; but it is the manner, if it was cruel, and not the result that ensued, which you are to consider; it is not the injury to Mr. Davis that you are to regard, but whether the mode in which that injury was inflicted, indicated a ferocious disposition and a cruel heart.

Even if Mr. Darnes had shot him through the head, although death might have ensued instantaneously, the manner may not be cruel, notwithstanding the injury was mortal and immediate:—the mode of the death must be cruel; tying a man for instance, hand and foot, and throwing him into the river, until he was drowned, would be cruel; but not so, shooting him with a pistol ball, or stabbing him with a knife: those circumstances do not show cruelty, and to strike a person with a brick-bat, or a four-legged stool, and kill him, although not cruel in themselves, may be said to be cruel, if the mode in which Davis' death occurred, should be considered so.

(*Mr. Allen read extracts from Mr. Rowan's speech, Trial of the Wilkinsons*,¹⁸. The drift of the argument in the Kentucky case was, that the dishonor occasioned by the application of the cow-hide, could be blotted out only by the blood of the assailant, and that his death was justifiable in Kentucky, if not by express statute, at least by a law that was paramount and instinctive.)

Something more than the safety of our lives is an object to men in this country; the preservation of our honor is the first consideration with us Americans. In England the king wants the lives of his subjects, and therefore, the law there punishes the deprivation of life more severely; but here we are all sovereigns, each of us equal to the king of England, and we feel that something more is at stake than mere animal existence. There is not a gentleman upon that jury, but who would take the life of the man who should attempt to cow-hide him, and the opposite counsel themselves would do the same. How then, can you implicate Mr. Darnes whose honor was equally compromised, and upon whom epithets of the grossest and most offensive character were poured in the columns of a paper that circulates through the whole Union; and what is the difference to a man whether his honor is sullied by blows from a cow-hide, or his reputation attacked in the vilest manner in a newspaper?

Gentlemen of the jury, you are not to apply the strict English law in this case, that a man is bound, when attacked, to retreat to the wall before he kills; it is not the law of

the State of Missouri, nor is it the law in Kentucky, nor is it the law in Virginia.

Another consideration for you, gentlemen, is whether from the character of the wounds, Davis died of them, or of the treatment which he received; and if there be any reasonable doubt upon your minds that he did not die of the wounds, you cannot convict. An eminent Edinburgh physician, having, in the midst of an extensive practice retired, and being asked why he did so, replied, that "he could not continue in the practice; he was tired of guessing." The medical profession was conjectural, it was pre-eminently one of guessing. At one time it was the prevailing opinion that alcohol and bleeding only were wanted to cure all diseases, and the most eminent physicians differ in opinion as to the mode of treatment to be pursued in the simplest cases. Sir Astley Cooper and other celebrated practitioners differ in their writings as to the mode of treatment of the same disease. The Jury then may very well be in doubt, if we prove to them by highly respectable medical gentlemen, that the treatment pursued in Mr. Davis' case, was not the most proper, although Dr. Sykes and Dr. McMartin both said that the treatment was the best—still there may be a difference of opinion, and those gentlemen are of course interested to support themselves in their testimony; if they were not, why was it that the skull of Davis was prepared, and kept so long in the hands of Dr. Sykes? We will prove to you that a friend of the deceased wanted to have the Doctors, Lane and other eminent physicians, present at the post-mortem examination, knowing that there were unfavorable reports abroad as to the mode of treatment pursued; and there must have been something wrong in the matter, when the old and eminent practitioners of the place were excluded; they invited Dr. McMartin, Dr. Brown, Dr. Meredith Martin, Dr. Adreon, Dr. Lott and Dr. Lorton; now, I have lived fourteen years in St. Louis, and I know nothing of them as physicians; many of them are young men, and have been in the city but a short time. Here Dr. Sykes throws himself into a dilemma, because he did not invite those that were known and

eminent; but perhaps it would not answer if the most eminent were invited, although in my opinion he was bound to risk his reputation to do justice to Mr. Darnes. The treatment followed is of the highest importance to Darnes, and the character of the post-mortem examination throws a shade over the whole affair. Dr. McMartin contradicts himself when he says in his testimony, that trepanning is not dangerous, and yet he afterwards declares, that any injury to the skull is dangerous—and by whom is Davis' skull kept, and in whose custody does it remain—why it remains with Dr. Sykes, the man who himself assisted at the operation. I will say, however, that I do not ask you to declare that Dr. Sykes' treatment of his patient was bad, because it is enough for my purpose, if I prove to you that any doubt can reasonably exist as to the treatment.

(*Mr. Allen* read various passages from Sir Astley Cooper's Lectures, the authority of which went to prove that, in cases of fractures of the skull, when there are no symptoms of injury to the brain, depletion, purgation, and application of plasters, were better than the use of the trephine; that trepanning was one of the most dangerous operations in surgery, and that by the use of the instrument alone, a simple fracture might be changed into a compound one; that it required the most careful operator, and that by depletion symptoms of extravasation may be removed, so that in a few hours, the trephine, which at first seemed indispensable, would be deemed unnecessary; that it was wrong to decide hastily in favor of the trephine; and that even if the fracture is compound, inflammation usually ensues, and trepanning then is useless, as death is the consequence; that there was but a thin web between the instrument and the brain, and if that was perforated, the patient died. He also referred to Dr. Hunter's opinion as to injury of the dura mater by the operation, and exemplified the danger to the Jury, by the comparison of two thin pieces of paper, one above the other, but close; to cut the upper one of which almost necessarily occasioned the cutting of the under one, in which case death ensued.)

If, then, you find, gentlemen of the jury, that the cane used in this case was not a dangerous weapon, such a one as is used for offence and defence, or if you find that although, in your opinion, it is a weapon, it yet is not a dangerous one, and that it was not used in a cruel or unusual manner, you cannot find the defendant guilty of manslaughter at all. You have also to consider if it was not of the medical treatment

that Davis died, but of his wounds, and even if you entertain a reasonable doubt on that point, you cannot convict. But if you should find that Mr. Darnes had no design to kill Davis, but merely to chastise him, that he desisted when he found that he was injured, that the provocation which he had received was sufficient to justify the heat of passion, and that in the heat of passion, with an instrument not a weapon nor dangerous, upon sudden quarrel, he killed him; then under the law which I have read, you can find him guilty only of excusable homicide; you will also remember that Davis was armed for the occasion and that the sense of the community called upon Mr. Darnes to chastise him; he showed his pistol in the morning and said there was no run in him; it is idle then to shift the responsibility from Davis to Gilpin, for this very act of Davis proved that he felt he was responsible and prepared himself accordingly to meet that responsibility.

November 9.

*William Beaumont*¹⁹: Am a practicing physician and surgeon in this city; have been a surgeon in the United States army. Attended Mr. Davis at the hospital. Dr. Sykes, Dr. Martin and several other gentlemen were in attendance. Found his head very much contused, and the bones fractured; the skull depressed in several places; the fractures very extensive; the injuries were situated on the frontal, temporal and parietal bones of the cranium; on the left side of the head; the fore-part of the forehead was broken over the eye on the left side; there were three distinct fractures very evident on the first examination; there was depression of the tables of the skull upon the brain; the indi-

cations, according to the best judgment, required immediate operation for the preservation of his life; upon raising the scalp, we found the fractures extending in every direction, from the region of the forehead to the temporal bone over the orbit of the eye and back to the ear; we removed the skull in the neighborhood of the fracture, and elevated the depressed portion; found the membranes injured and spicula of the bone driven down deep into the brain; several of the pieces of bone were taken out at the time of the operation; the wounds were then dressed as usual. Mr. Davis remained as comfortable as could be expected under the injury, and rallied from the first effects of the injuries; he was still laboring under the

¹⁹ On account of the witness' infirmity the questions were written and read aloud by counsel and then handed the witness for answering.

symptoms of concussion; the course of treatment was anti-phlogistic to keep down inflammation, bleeding, cathartic, cold applications, antimonial treatment. Mr. Davis appeared comfortable for forty-eight hours under this treatment; after that, unfavorable symptoms of compression of the brain and inflammation occurred, notwithstanding the most efficient means were used, violent symptoms continued, inflammation and suppuration of the brain came on, and death was the consequence of the injury. Was present at the post-mortem examination; the following appearances presented themselves—more extensive injury discovered than at the first examination, exhibiting injuries on four different points of the skull, the effects of the blows of the cane, extending from the frontal bone through the orbit of the eye, and along the temporal bone across the ear; a continuous fracture; large spicula of the bone were driven through the membranes, depressing the dura mater and rupturing the brain; an extensive effusion of blood coagulated between the dura mater and the skull; there was ulceration and suppuration of the brain from the force of the injury and consequent inflammation; there were pieces of bone lying on the surface, irritating the membranes, exhibiting an injury beyond the reach of human skill to relieve. The exhibition of the brain showed an impossibility of recovery, whether there was an operation or otherwise; the skull was in the part injured, literally shattered to pieces; and was one of the most exten-

sive injuries, by fracture of the skull, that I ever witnessed; was surprised the subject did not die on the spot; the spicula were driven into the brain by the force of the blows, having been broken off from the inner table, and sent through the membrane, as a musket ball, passing through a board, knocks off splinters, and drives a portion of them inwards, so parts of the bone of the skull were driven through the second table upon the brain; several pieces of the bone were removed upon the first examination; others were found upon the post-mortem examination; the fractures were simple, compound and complicated; the greatest injury was to the substance of the brain. There could be no doubt, in the mind of any surgeon of knowledge and experience, that the operation was immediately required; there was no room for delay; without an operation, elevation of the skull, and removal of the spicula of the bone there was no chance—with it there was a chance. Had no doubt of the necessity of the operation, when I first saw Mr. Davis, nor at the post-mortem, nor have I had any since; the operation was imperiously called for; undoubtedly, most certainly from ocular demonstration, there was depression of the brain to the extent of a quarter of an inch; there was no chance of relieving the depression without an operation; the man could by no possibility survive the injury and its consequences, or the inflammation produced by the sharp pieces of the bone, without being operated on. The patient was bled immediately on appearance of reaction of the

system, either on the evening of the injury or next morning; the great artery of the dura mater was ruptured at the sphenoid bone. Have not the least hesitation or doubt on my mind, that the effect of the injury of the brain, occasioned by the blows inflicted, were the immediate, proximate, and only cause of his death—they were enough to slay five men.

Cross-examined: When I first examined the patient there was no appearance of compression, surgically speaking; compression of the brain is the secondary effect of inflammation; when a bone is depressed it produces compression of the brain. I am not infallible in my opinions nor in my treatment of patients. I have not vanity enough to think or say that I was never mistaken. Sir Astley Cooper is considered, at home and abroad, as high authority as a surgeon; his Lectures are in the highest esteem. The symptoms denoting the necessity of trephining are the marks of fracture of the skull, lacerating the soft parts, shivering and depressing the bone. There are no two indications or opinions about it; the trephine is sometimes used when there is no insensibility of the patient, stertorous breathing, slow and laboring pulse, or dilatation of the pupil—we must not wait for consecutive effects when there may be danger in delay; its necessity may be judged of from the mere external observation of the wound; in mere cases of concussion, without compression, the immediate use of the trephine is not called for; in such cases delay is proper until

symptoms of compression ensue; nausea is symptomatic of concussion, and also, of compression; the pupil is fixed during the period of concussion and contracted, indicating incipient inflammation; in compression the pupil is dilated; the use of the trephine necessarily, produces inflammation to a certain degree, but it must be used before all other remedies have failed, otherwise the operation would be of no service, it would be too late. The highest authority in surgery advises the application of the trephine at once, without waiting for fatal symptoms; there must be a sound discretion used; some of the best authorities, however, will not trephine until the last extremity; others, in certain cases, will do so, when there are no alarming symptoms; have seen instances of both in the U. S. Army, sustained by the U. S. Surgeon General; know of no instance of foreign substance lodging upon the brain, and remaining unremoved, and the patient survive; slight depression has been suffered and recovered from, without the use of the trephine. When the trephine is used unnecessarily, it certainly increases the danger—there is certainly danger in perforating a man's brain; when there is occasion for its use, it does not increase the danger; any man may have his head trephined, with some risk and danger, but without running any great hazard. Thomas Cooper, Bell, Liston and Gibson, and also Dorsey, are very good authorities. Depression of the skull will not necessarily produce inflammation of the brain.

THE WITNESSES FOR THE DEFENCE.

David T. Brigham: Saw Mr. Davis on the 1st June between one and two o'clock at Olive and Main. He asked me if I had seen the *Argus*, what I thought of it. My reply was, "It was rather spicy." He said then, "I reckon they thought there was no fight aboard but they'll find themselves mistaken." Know nothing of the scuffle; never saw Mr. Davis afterwards; was acquainted with him for ten years; knew him in Massachusetts.

Alphonso Wetmore: Saw most of the affray; saw Mr. Darnes half an hour previously at the National Hotel. Darnes asked me if I had seen the *Argus*; I told him, yes; he then told me he intended to chastise Mr. Davis; he had a small cane in his hand such as has been described. Was about proceeding home when some one mentioned there was a fight. Was standing with Mr. Simons near the door of the bar-room, inside. Went out and saw Darnes and Davis engaged; Mr. Darnes was using the small end of the cane, with one hand—Mr. Davis was returning the blows vigorously, with his umbrella in both hands; he seemed to be rather gaining the advantage; directly after the cane seemed to be bent and Darnes changed the other end of it: a few blows, perhaps three, were inflicted in quick succession, which seemed to paralyse the exertions of Mr. Davis, who stepped back just as Mr. Amos came up; when Davis seemed hurt Darnes desisted. Saw Captain Grimsley at that moment, near to Darnes, and he

exclaimed, "Don't strike him any more." I advanced with the view of parting them, when I saw that Mr. Davis was hurt; I stopped when Darnes desisted. Mr. Amos took hold of Mr. Davis and passed with him into the National Hotel. Then perceived Davis was bleeding as he came near. Did not see Mr. Davis any more; saw Mr. Darnes afterwards near the drug store; he came up—Mr. Simons and Captain Grimsley were standing with me. Darnes addressed himself directly to one of the three and regretted exceedingly the necessity of having made the assault on Mr. Davis, saying, "He would have sooner or as soon, have struck his own brother."

Charles Loring: Live thirteen miles from St. Louis, near Manchester. Was going down Third street towards the National Hotel; saw a collection of persons, as I was crossing from the Baptist Church over to Consaul's stable. Continued on the street and then I stepped on the sidewalk on the east side near a little coffee-house. They were inclining from the curb-stone towards the corner. The man nearest to me was a large man; he was striking with his right hand very fast and as he struck he seemed each time to step back; the other person seemed to strike also, probably a couple of licks, but whether he did strike or not I can't say. Eight or ten or twelve blows were struck by the large man and I thought the small man struck every lick. His back was to me. The small man then inclined towards the National Hotel. The

large man then changed the end of the cane and struck him two or three licks which I thought all took effect and then the small man was in a falling position, when Amos caught him. When I looked at the large man I knew him. Went into the hotel, heard the small man was Mr. Davis; never saw him before. Had seen Darnes at Manchester some time in the Spring. Noticed no other person but Mr. Grimsley; saw no other weapon attempted to be used; saw an umbrella handle broken, a foot long, in Davis' hand when Amos caught him.

Cross-examined: William P. Darnes was the large man, Mr. Davis, the deceased, was the small man.

Selar Simons: Was about the National Hotel on the day the affray took place when Mr. Darnes came in. Told him they used small letters on him; Darnes said he intended to chastise Mr. Davis or make him take it back; that was about ten in the morning. Supposed from what I heard about town there would be a difficulty. Was at the National when the affray took place; saw Darnes at the corner; saw Mr. Davis coming down Third street; I stood at the north door. While my attention was turned away the affray commenced; the first I saw they were striking, Darnes with the small end of the cane, and Davis with both hands on the umbrella, striking very fast; some of the blows did not hit, some did. After some blows, Darnes' cane bent, and he took it by the middle, striking at Mr. Davis, who waved his umbrella backward and forward, and

sometimes one would hit, and sometimes the other; sometimes the cane and the umbrella met, neither taking effect. Mr. Davis stepped back after a few blows, and the combat ceased. Mr. Amos came down street and took hold of Davis, at the same time Mr. Grimsley spoke to Mr. Darnes not to strike any more. Mr. Davis was taken into the house. Darnes came up, said he regretted very much being under the necessity of having had this difficulty with Mr. Davis, as they were friends; he would as lief have a difficulty with his brother, then went into the drug store; he was absent a moment or two and came back; he conversed with some persons standing there, then started up Market street; had no cane with him after he went over to Johnson's.

Charles Billon: Saw the affray; was at the corner of Third and Market streets. Saw Mr. Davis and Mr. Darnes in the center of Market street standing close together. Passed near them; I got a little above the steps of the National Hotel, turned around, hearing a noise. Saw Mr. Darnes and Mr. Davis engaged in fighting; thought it was a riding whip Darnes had in his hand. There was a blow struck with the switch, as I thought it to be. Think the first effective blows were given by the umbrella. The hat was knocked down over Darnes' eyes so as to cause him to shake his head; it was some time before he could recover himself. After recovering himself he struck very quick with his cane or whip at Mr. Davis; Davis was using his umbrella at the same

time in his two hands, backward and forward. Davis kept backing towards the Drug store; think they were the full distance of the umbrella apart; at this time discovered the stick or switch had been turned, the small end being in Darnes' hand; there were two blows then from the cane or switch on Mr. Davis' shoulder as I thought; but they were warded off partly by the umbrella; Darnes' stick was then bent and doubled up, from striking the umbrella. Up to this time thought it a riding whip; and another blow was then struck by Darnes here; (witness pointed to his left temple) Davis then flinched and sunk on his knees; then took hold of Mr. Davis, and told him to stop, that he was too much hurt. Mr. Amos ran down with me towards Mr. Davis; at the same time, he took hold of Mr. Darnes, exclaiming, "Stop! for God's sake;" led Mr. Davis towards the National Hotel, when either Mr. Stickney or Knight came to him, and Mr. Amos picked him up and carried him into the house. Went out with others to hunt a physician. Mr. Amos applied his handkerchief to the wound; it was bleeding profusely.

Cross-examined: Do not say the blows of the umbrella threw the hat into the position spoken of; it was all done in a shorter time than I can answer one question. Do not say the blows didn't reach Darnes. Was at first about a hundred feet from the scene of action. Think Mr. Davis did not strike Darnes after the heavy end of the cane

was turned, nor strike at him within striking distance.

Thornton Grimsley: Was the bearer of a communication from Mr. Darnes to Mr. Davis; was standing at door of the National Hotel with a gentleman of the name of Logan; my back was to the north. Mr. Logan observed, "There is a fight;" I turned and there were so many persons between me and the combatants could not distinguish who it was at first. Looked and found it was Mr. Darnes and Mr. Davis. Before I could possibly make my way to the curb-stone the combatants had separated. I exclaimed on that occasion, "It is a fight between two political friends, let it be a fair fight." Before I got in reach of the parties Mr. Amos took hold of Mr. Davis. I hollowed to Mr. Darnes to not strike any more, fearing he would do so from the violent publications. Mr. Darnes after the fight, advanced to the curb-stone; he said he had nothing against Andrew Jackson Davis but he held him accountable for the attacks on his private character in the *Argus*. He stated he had sought honorable redress and it had been denied him; that he had come in contact with Mr. Davis for the purpose of explanation; he had refused to explain, and for that he had chastised him. Saw nothing of Mr. Darnes afterward, except that he went into the druggist's store opposite; did not observe the cane in his hand, in the shop.

Cross-examined: Had a conversation with Mr. Darnes on Sunday; there was no conversation as to the course to be pursued, after the receipt of

that letter. Mr. Darnes seemed to be astonished at receiving such a letter from Mr. Davis; he could not account at his not recognizing him as a gentleman; did not retain a copy of the letter conveyed by me to Mr. Davis; the *Argus* retained that; I never had a copy. I offered to read this, (holding up the letter) on the examination before the magistrates, which is the genuine one, and which was dishonorably published in the *Argus*. Knew on Monday that Darnes would chastise Davis if he would not explain. A very small iron cane was the only arms I saw Darnes have before the attack; he had a bowie knife also in and upon his person at the time. A little after

ten o'clock, on Monday, I knew from Darnes that he would demand an explanation from Davis, and in the event of that being refused, he would chastise him. Mr. Darnes, on that occasion, asked me to bear another letter to Mr. Davis, seeking to know what he had against his character; this was on Monday. Don't know if Darnes had read the *Argus* of Monday; he was acquainted with the contents from the way he appeared. Have no doubt but that is the letter, did not read it. I kept it some time in my possession, all the time the fiddle was playing in the *Argus*. This letter was in my possession for two months until it was given to Mr. Allen when the prosecution was expected.

Mr. Allen read three letters in evidence, Darnes to Davis, Davis to Grimsley (see ante pp. 100-101), and the letter last proved, viz:

"St. Louis, June 1st, 1840.

"To ANDREW J. DAVIS, Esq.

"Sir:—I transmitted to you on the 30th inst. a note through Capt. Grimsley, which you returned to him by Mr. Hudson, inclosed in a note from you, containing the following paragraph: 'From the character of the author, and the contents of the letter which you handed me this afternoon, it is entitled to no notice or reply from me.' You will please specify in what particular you take exceptions to my character, that forbid a reception of my note above alluded to.

"Respectfully,

"W. P. Darnes."

John E. Johnson: Of the affray I know nothing but I am cognizant of most of the circumstances previous to it. Knew both Mr. Darnes and Mr. Davis for two years previously. Held Mr. Davis in the highest esteem as a man and a gentleman; entertained no different opinion of Mr. Darnes. Mr. Darnes is a peaceable citizen from my opinion of him; he would not hurt

a fly, much less a human being. On Saturday preceding the fight he was in my store, he and Mr. Bayfield were in conversation. After the conversation I was called into the room; then understood that a challenge had passed. A gentleman who had been in the habit of leaving his firearms with me when in the city had called on me on Saturday. Kept them locked in my

desk; he demanded his pistols on Saturday afternoon, which I gave him. Heard that gentleman, Mr. John E. Cowan, utter a threat against Mr. Darnes or any other person who would attempt to attack Mr. Davis. Informed Mr. Darnes that afternoon that such was my opinion. On the Monday succeeding between nine and ten showed Mr. Darnes the editorial in the *Argus*; he observed he had seen it. About eleven met Mr. Darnes at the corner of Pine and Main streets; asked him if he had seen Mr. Davis; he said he had not but that he wished to see Mr. Davis as this affair he was convinced could be easily explained. Observed to him he ought to be extremely cautious, as, if Mr. Davis should not choose to explain and any contest arose he might be shot in the street. He said he was not at all alarmed, he was not armed nor did he intend to be. About half-past one he came to my store again. I observed he should be prepared against others as well as Mr. Davis; informed him of this gentleman being armed. He repeated that all would be done away the moment he saw Mr. Davis, as an explanation would ensue; said if he did not explain he would slap his face. I said if I went on a thing of that kind I'd go with a brace of pistols; he observed, no, it was not necessary, he would have nothing such about him. Half an hour afterwards returning from dinner was hailed by Mr. Darnes and accompanied him to my store. Mr. Amos fell in with us; Mr. Darnes regretted he had injured Mr. Davis. First saw him with

the cane at my store before dinner.

Philip Reilly: Knew Mr. Darnes in 1835 in Baltimore; never heard anything said against his character; he always behaved himself as a good citizen. Knew Mr. Davis well; Mr. Darnes and Mr. Davis were very intimate in the Lyceum; it never ceased until this unfortunate occurrence.

Henry Deane: Have known Mr. Darnes since 1829 or '30; first knew him in Winchester, Va.; knew him when he first went to his trade; he worked under my instructions for seven or eight months. He went from there back to Baltimore. Never heard anything against his reputation; he always bore a good character.

November 10.

T. O. Duncan: Was in the barber's shop when the conversation occurred between Mr. Darnes and Mr. Hendry, the morning of the affray; Mr. Hendry was getting shaved at the time. Mr. Anderson remarked to Darnes, "You catch it in the *Argus* this morning." Mr. Darnes replied, "Yes, I have seen it" and further remarked that he had done all he could in the matter and said he had sent a challenge to Mr. Davis. Mr. Hendry remarked that Mr. Davis would not receive his note and that Mr. Grimsley was the man who should meet Mr. Davis. Mr. Hendry's manner was rather taunting and Mr. Darnes said, "You had better take it up." Hendry made no reply but left the shop.

John H. Wilson: Was in the bar-room of the National Hotel the time of the affray; saw sev-

eral persons moving towards the door; went out with them; saw Mr. Darnes and Mr. Davis in the middle of the street; Mr. Davis had an umbrella in his hand and Mr. Darnes a small cane; both were striking at the time I went out; four or five blows passed probably. Davis' umbrella was broken; don't recollect if Darnes struck him after that, but think not.

Derrick January: Was going up to the National Hotel; about thirty yards from the door I saw two men in a scuffle, then saw a few blows given, Mr. Davis with his umbrella and Mr. Darnes with a cane. Davis was bleeding a good deal but did not appear to recoil from the blows. He was led into the hotel; Mr. Darnes remarked that he had been injured by Mr. Davis, that he had been very much attached to him, that there was no man in the community he regretted more having a difficulty with, but that he felt he had to chastise him.

Peter R. Pratt: On the 1st June was in the National Hotel in my room in the third story. Saw two men in the street, talking for some time; one gave the other a slap; do not know which gave the other the slap; never saw the men in my life before; both stepped back one step, one raised his umbrella the other his cane; can't say which struck first. Mr. Darnes struck the other man on the head with the small end of the cane, the cane bent, he then turned the other end and gave him several raps on the head; heard the voice of Mr. Amos saying, "Boys, quit it." Then ran down, saw Mr. Amos hold-

ing his head with his right hand; his head was bleeding very freely; I pulled out my handkerchief and proposed to bind up his head—some one said, "No, better not." I then observed, "God d—n it to hell, can't you find a physician in so small a place as St. Louis?" Blows were given on both sides, both put themselves in an attitude of fight and went at it like fine fellows. Saw no effort to use arms on either side. When Darnes struck Davis first Davis' left arm dropped down—this blow probably struck Davis' head or hat. Davis struck at first with both hands; there was only one blow perhaps with both hands.

Cross-examined: Do not know that Mr. Davis' hat was off at the end of the fight.

John J. Matrasse: Saw the affray; was standing in Mr. Johnson's drug store. Mr. Bayfield observed to me, "There's Darnes and Davis in conversation." They spoke a minute or two, Mr. Darnes then raised his right hand and slapped Mr. Davis in the face. Mr. Davis raised his umbrella and struck him on the right shoulder; Darnes raised his cane and struck Davis. They both raised about the same time, they struck five or six blows, blow for blow. Mr. Darnes then fell back towards the curb-stone of the National, Mr. Davis followed him up. Darnes then drew the cane through his hand, turned the cane and struck Davis with the large end five or six blows. Davis' umbrella either broke or fell out of his hand. Davis then fell back and Darnes remained where he was standing.

Ran out to the door when the last blow was struck; when I got half way across the street saw that Mr. Davis was hurt. Previously saw Mr. Amos walk up to Mr. Davis and put his hand on his head and with others took him into the hotel. Walked over with Mr. Darnes to the store, he remained there a minute or two and then went home. Did not see Mr. Hendry about there, saw him after the fight about fifteen or twenty minutes; he came up as I stood at the corner at the drug store. He inquired for Mr. Davis, I told him he had gone into the National very much hurt. Mr. Hendry made a remark then much to this effect, "D— him," meaning Darnes, "something ought to be done with him." Mr. Hendry then left the ground. Heard persons make threats in the store against Darnes. Major Cowan was the gentleman who made them; he said the morning of the affray, "he be d—d but he would make a hole through Darnes or any man who would lay a hand on Mr. Davis." Major Cowan took his pistols away after he had loaded them. Mr. Darnes was not present but I warned him to arm himself as I thought his life in danger. It was an hour or two previous to the affray that Cowan did this. Do not know if Darnes had a cane then.

Cross-examined: Mr. Darnes used to be at the store two or three times a day, he had no particular business but came in after his work in a friendly way. Have been on terms of friendly intimacy with Mr. Darnes before and since the af-

fray; have talked with Darnes of the affray since. Do not know if Darnes when he came over to the store after the affray took a glass of soda water; he stayed but a few minutes, I did not observe him leave his cane there, but he certainly went out of doors without it; did not see the cane in the store after he left; can't say that he took the cane into the store; have not seen the cane since. Saw Mr. Darnes draw the cane through his hand as if to straighten it during the affray. Davis during this struck Darnes one or two blows before he struck him again.

Herman L. Hoffman: Have known Mr. Darnes between eight or twelve months, perhaps fifteen or eighteen; have always considered him a very peaceable citizen. Know Dr. Sykes and Dr. Beaumont. Dr. Beaumont's general character is that of a respectable physician and surgeon. Dr. Sykes exhibited parts of the skull in my room at the National Hotel; my wife was present.

Cross-examined: The pieces of skull exhibited by Dr. Sykes were those taken out by the trephine.

John J. Anderson: Was at the barber's shop on the morning of the encounter; Mr. Hendry, Mr. Darnes and myself were present. Remarked to Mr. Darnes, "You have got thunder in the *Argus* this morning;" Darnes said, "I can't get at them, they won't fight;" he also said he had already challenged. Mr. Hendry then said that Darnes had nothing further to do with it, that it was now between Mr. Davis and Captain

Grimsley, but said he, "Why don't you challenge Gilpin—you are afraid to fight him." Darnes turned round and asked Hendry if he would not wish to take it up; Hendry smiled and went out.

William S. Anderson: Became acquainted with Mr. Darnes in 1830 in Winchester, Va. He was a young man who bore the best reputation and mixed in the best society. He had been sent to Winchester to receive a part of his education. Have known him in Missouri about one year; his general character was perfectly good as a peaceful man, until this affair of which I know nothing.

Thomas J. White: Heard most of the testimony of Dr. Sykes and Dr. McMartin. I am a physician and surgeon in this city and have practiced as such for fifteen years. (After describing the symptoms of concussion of the brain) Compression may be occasioned in three different ways: the first by depression of bone upon the brain, the second by effusion or extravasation of blood between the dura mater and the skull, the third is by the effusion of matter on the brain. There is one more mentioned by Charles Bell—it is a fracture and depression of a portion of the bone driven under the unfractured or sound portion and requiring the trephine to remove it. These are the only cases requiring the use of the trephine according to the great weight of surgical authority. Sir Astley Cooper and Liston mention one other case in which they advise the trephine—it is in compound fractures of the skull with de-

pression of bone without present symptoms of compression. Should never perform the operation myself, in any case, unless it was for the removal of existing bad symptoms, such as I have detailed as symptoms indicating compression; my reason is, that the operation is dangerous in itself, and occasionally and frequently adds to the symptoms already existing. If the symptoms as I have detailed were not present in Mr. Davis' case I should not have performed the operation, unless it was beyond all question that spicula of bone, being driven in, were irritating the membranes or substance of the brain, so as to put it beyond all question that inflammation of the brain would follow that state of things—and in order to ascertain that fact, you are not to be governed by the appearance of the wound generally, but by the symptoms of compression I have mentioned; these spicula irritating the membrane sometimes produce epilepsy and also spasms. My course has been, and I believe such has been the well-established custom in cases of this sort, to deplete freely from the beginning by venesection, give cathartics to lessen and prevent inflammatory symptoms, and to wait patiently and see if symptoms of compression come on or not. Previous to the operation, the room should be darkened, both before and after and during the operation, to prevent the patient's mind from being excited; he should not be allowed to talk, he should be kept quiet. Sir Astley Cooper, Liston, Gibson, Hennen, Samuel Cooper, Dorsey, Baron Larry are

approved surgeons. Heard the symptoms described by Dr. McMartin and the other witnesses in Mr. Davis' case, and should not myself have performed the operation, from the want of the symptoms of compression.

Dorsey says the trephine should never be used except when symptoms of compression appear; he puts the question, should the trephine be used in compound comminuted fractures, before symptoms of compression have appeared—he answers, no, and in this he is sustained by Abernethy, John Bell, Dessault, S. Cooper, Gibson, and Charles Bell. Sir Astley Cooper advises that every effort be made to elevate the bone, before resort is had to the trephine. Dorsey suggests to wait twelve hours at least, to see if symptoms present themselves, and to use depletion in all cases, previous to use of the trephine. The rule in surgery in this—we must never operate on account of extent of injury, we must be governed exclusively by symptoms.

Mr. Engle: Were the wounds as described adequate to produce death?

I will not answer that question because it depends upon a great many circumstances—a medical man is not called upon to say yes or no to such a question: a slight wound may become dangerous and a dangerous wound may become mortal by maltreatment; in other cases the greatest possible injuries may not produce death—a small puncture upon a lady's finger with a needle will sometimes produce death, a lump on the head is sometimes fatal. Have

known the scratch of glass to produce death, by inducing tetanus or lockjaw. The class of wounds such as Mr. Davis' are described to be is dangerous. Wounds are classed as slight, dangerous and mortal. The wound on the finger I should call slight—a dangerous wound is one from which death may be apprehended. It is difficult to say whether Mr. Davis would have lived if no medical treatment had been afforded him. I don't think it at all certain that if Mr. Davis was my patient I could have saved him; wounds of this description are very uncertain.

Mr. Engle: Do you know of any injury that could happen to a man that would be certain to prove mortal?

Yes, if a bayonet were to be passed through both ventricles or auricles of the heart I should consider the wound mortal, or a wound of the aorta. Dorsey says that in no instance should trephine be used except where there was compression. Know of no instance in Abernethy where the trephine was used and no symptoms of compression existing. Abernethy's general doctrine is never to operate until symptoms of compression show themselves: in case that spicula are thrown on the brain, then operate, in stellated wounds. If the spicula are discovered afterwards on the brain, it's palpable proof they were there and it would show that the operator, without waiting for symptoms, had made a good guess. Believe, however, that the operation has been performed and death ensued where it would not have been so, if

the operation had not been performed; if we were all Listons or Sir Astley Coopers we might operate more frequently than we do.

William Carr Lane: Was appointed Surgeon's Mate in the U. S. Army in 1813; have had experience in surgery. Have heard the description of Mr. Davis' wounds. Only heard part of Dr. Sykes' testimony; it is difficult to lay down a rule to show where trephining is necessary; each case must depend on itself pretty much; I think it necessary in depression of the bone and great disturbance of the system; it depends also on the constitution of the patient; and whether he be young or old.

The operation of trephining is a very hazardous one, it is not to be used unless all the circumstances of the case make it imperiously necessary; there was a case in my own practice, where a child, Captain Daggett's child, a boy of about four or five years old, fell off a bench into a cellar on a pile of stone and fractured his skull; it was badly broken all round, and attached only to the rest of the skull at one end. I saw the child about two hours after; it had convulsions and was bled freely; the depressed portion of the bone had got to the lower table, although a piece of the bone was attached. Dr. Hall agreed with me not to use the trephine, and the child is well. I should certainly use medicines before I trephined and prepare the system by depletion and purging, unless the patient lay insensible before me. I should bleed to death, according to Dr. Physic, before I used it; and

unless in violent compression I would not trephine. I have trephined only three or four persons who have recovered; I have performed the operation with different results very frequently.

Dr. Physic in injuries to the head recommended strong purging and bleeding and justified his practice by the opinion of the celebrated Hunter. Hunter he says once told him to bleed his patient first, when having done so he asked him what next; Hunter then told him to bleed him again which Physic did accordingly and again inquired what was next to be done when he told him the third time to bleed him to death and he got well. Trephining is a very difficult operation and requires many accomplishments, dexterity of hand, etc.

Cross-examined: Wounds such as those inflicted upon Mr. Davis, by the doctors' testimony, are likely to produce death. A skilful surgeon need not wait for a post-mortem to discover spicula on the brain and remove them.

Franklin Knox: Had a conversation with Dr. Beaumont on this case in three or four days after the operation; heard a part of Dr. Beaumont's testimony; as I heard that spicula were taken out of the brain and exhibited about town, I enquired of Dr. Beaumont if the dura mater was wounded; he said the membrane was uninjured and smooth under the trephine. Am a physician and surgeon; would not use the trephine without symptoms of compression, viz., pulse slow, full and laborious, breathing as

if sighing long, &c.; did not hear the description of the case by Doctors McMartin and Sykes. It is a fundamental rule in surgery, and one that was inculcated by my professional teachers, that the trephine is only used when symptoms of compression are present. Professor Warren of Boston also advises not to use it, and Doctor Gibson, in one of his lectures stated that it was undoubtedly true that more lives had been lost by the use of the trephine than ever were saved by it.

Cross-examined: The trephine is applied to the sound portion of the bone, and must cut out a piece of the sound bone and be adjacent to the fracture. I never heard of any respectable surgeon using the trephine except in cases of compression, within the last thirty years. Consider Sir Astley Cooper a respectable surgeon, and so is Abernethy; Abernethy may have related some of his own blunders, but I doubt of his recommending the use of the trephine without any symptoms of compression.

Louis Du Breuil: Summoned the jury at the Hospital on the inquest; had subpoenas for a great many physicians, Doctor Carpenter, Doctor McDowell, (the subpoena for Dr. McDowell was taken from me by the coroner, who scratched out McDowell's name,) Doctor Adreon, and eight or ten physicians. Don't know who requested me to summon Dr. McDowell; Mr. Spurr and Mr. Consaul objected to hold an inquest at all, and I think Mr. Engle.

William Renshaw: Called at the office of Doctors Beaumont

and Sykes, on the 4th of July for medicine; Doctor Sykes said: "You heard a good deal of our practice in this affair of Davis;" he showed me the skull where it had been trephined and some small pieces that he said were taken out; his object seemed to be to defend himself and his colleague from slanderous aspersions. Have known Mr. Darnes since 1837 or 1838; he is a very peaceable man; he was in no broils except this one.

Esrom Owens: Some person at the hospital wished a great many physicians summoned on the inquest; there were the names of sixteen witnesses on the subpoena, one of them was Doctor McDowell, and as I knew there were two Doctor McDowells in St. Louis, I scratched out the word Doctor and inserted Professor, thinking the professor was preferable if there was any choice, as his name was more known; I don't say this to disparage the other Dr. McDowell. Mr. Du Breuil said he could not find some of the witnesses; I summoned the Doctors who were present myself, thinking that those who attended him knew best; the post-mortem examination took place after his death; I was present at one post-mortem examination; next day I understood a parcel of physicians had another post-mortem examination.

William O. Anderson: Saw a note from Mr. Darnes to Mr. Davis. Can't recognize this note as the note I saw. Saw it in the hands of Mr. Davis: the note was to the effect of this note. I said it looked like war; Mr. Davis said "yes, there was

fight in it." On Sunday Mr. Davis said that he had sent back Mr. Darnes' letter through Captain Grimsley; Mr. Davis said that he considered Mr. Grimsley the principal in the matter and therefore he sent the note to him.

Charles Lewis: Was requested by Mr. Darnes to hand in the names of five physicians to be present at the inquest, viz: Dr. Hall, Dr. McDowell, Dr. White, Dr. McMartin, and Dr. Carpenter. Gave names to Squire Shepard who said it was too late as the subpoenas were out. Next day asked the coroner, Mr. Owens, why he did not subpoena the witnesses. Owens said he heard that those physicians had expressed opinions and therefore he did not summon them. Knew Mr. Darnes in 1832 in Baltimore; his character was good; he was a member of the Presbyterian church; he was a peaceable man.

Nov. 11.²⁰

Thomas McMartin: Saw a cane after the affray in Mr.

Darnes' boarding house where I boarded; the boarders showed it to me as the cane that did the injury. Did not see the injury inflicted. Did not notice if it was bent, it was pretty much such a cane as that; (an iron cane with a leaden head produced by Mr. Engle, presented to the witness) very much like it.

Samuel B. Churchill: On the 28th May last was editor of the *Commercial Bulletin*; a communication signed Anti-Sardanapalus was left at the office by Mr. Darnes; was not present when it was left, but met Mr. Darnes in the street, who said that, although the piece was not written by him he claimed the authorship, and wished his name to be given as the author; I wrote the editorial above the piece.

Cross-examined: The author was never demanded by any person that I know of prior to the difficulty of Darnes and Davis.

The following piece, signed Anti-Sardanapalus, from the *Commercial Bulletin* of 28th May, 1840, was read by *Mr. Engle*.

"NATURAL CURIOSITY."

"Messrs. Editors:—Some two years since, a filthy horse blanket and buffalo skin, supported by four sticks, concealed the body of a certain insect, which now buzzes somewhat in the ears of respectable persons in our community, illustrating the truth of the old

²⁰ It was understood that counsel would go to the jury today and the whole city was filled with the most intense curiosity, every avenue leading to the Court House supplied a stream of citizens that shortly filled the Court room to excess. The most splendid public occasion in St. Louis never presented a fairer or more numerous galaxy of ladies. His Honor courteously yielded his seat to the fair crowd and took a chair at the extremity of the bench, next the jury.

saying, that there are no vermin so small, that they are unable to give some annoyance.

"Now it was formerly contended by distinguished philosophers that souls, when they have left the body of one person, found a habitation in the body of some animal, from which, after a lapse of time, they would again become the tenants of a human form, and might infer from appearances of late, that this doctrine is not altogether so ridiculous as it at first seems. For the insect above alluded to, as concealed under the horse blanket and buffalo skin, has shaken off its vile robes, and peacock-like, is strutting the streets of our city, human in every thing but soul. It has even gone so far as to assume a name by which this heretofore nondescript may be known—its name is BILLY GILPIN. And since it has assumed the name of mortal, it may not be improper to determine its sex, and until better advised, we shall be pardoned we trust for calling it *he*.

"Language being the means by which we convey our ideas, and he, (Billy) having some feeble power to convey ideas in his mother tongue, we have learned from him that he had an existence previous to his appearance from underneath the old blanket and skin on Olive street, and shall avail ourselves of the information derived from Billy, as well as the other information which we have been able to obtain.

"With regard to his pedigree we understand (it comes from himself *a most unexceptionable authority*) that it is decidedly aristocratic, his sire being from old England, and descended directly from old Mr. John Gilpin, of race-riding memory, and, (if report is true,) the identical jugs attached to the saddle of the said John, are still retained in the family; and it is presumed the liquor, as it is understood to be the boast of Billy, that while under the guardianship of his aristocratic sire, the meat that he used was boiled in wine to encrease its flavour. The wine unquestionable, which was left in the jugs, which, like the widow's oil, will never give out.

"There came a period in Billy's history, when it was thought expedient (dreadful mistake!) to suffer him to leave the paternal roof and prepare himself for the business of life. The man's illustrious descent procured him a situation in a military school, where (*if he could be educated at all*) it would be done at the public expense. Billy resolved on being a warrior; the field of battle presented charms to him—probably he remembered the fame of his great ancestor; and concluded that he could show the enemy that he inherited the *speed* as well as name of Gilpin, from the immortal John.

"After having gained imperishable renown in the Florida war, by making the Indians run, (that is, he run and they after him,) he was unexpectedly found in the manner we have described, at the period when we commenced this article—from that time to the present, he has spent his time in boasting of his aristocratic descent and democratic pretensions, and in giving evidence of both, in entering barber shops, drawing pistols, and flourishing them to show

the "gemmen ob colour" how he would like to serve the rascally Federalists. This business, together with no inconsiderable portion of time spent in villifying the oldest and most respectable of our citizens, has occupied the time of this sprig of aristocracy since he has been here, except the time taken up in making an ingenious or able defence in the case of a man, charged with petty larceny (Billy being the counsel assigned by the Court) before the Criminal Court, where Billy was so extremely fortunate as to get his client—committed and sent to prison; where, if justice had been done, he would have had the pleasure of spending many a happy hour with his esteemed counsel."

"Anti-Sardanaplas."

Another piece, signed Sardanapalus, from the *Argus* of 27th May, was then read:

"MR. EDITOR: Having been informed that the marriage ceremony was to be performed between Mister Darnes and the Federal party, my curiosity led me to attend the meeting last evening, for the purpose of seeing the Gentleman take the oath of allegiance. After considerable stamping and hallooing, on motion of the Cataline, Dr. White was called to the chair, and *his-self* appointed secretary. He was then called on to go through with the ceremony in the presence of the Federal-British-Whig-United-States-Bank-Hard-Cider-Tippecanoe-Gourd-Convention-Party then and there assembled. After having stated the reasons which he would VAINLY attempt to make any sensible man believe caused the separation—viz: his love of country, his patriotism, his opposition to the sub-treasury, &c. &c.

'Were it not better to record the facts,
So that the contemplator might approve
Or at the least learn *whence* the crimes arose.
When the beholders know a Darnes conspired
Let him be told the cause—it is his history—'

and extending a general invitation to the young men of the Democratic party to accompany him in his apostacy. On motion a committee of five was appointed to draught resolutions. On retiring, however, there was only three of the committee to be found, the Federal lawyer Carroll, Scott, a professed Democrat, and a boy by the name of Magehan.—The meeting was then entertained by Mr. Lawhead, and a Gentleman from Illinois imported for the occasion, who had once professed to belong to the Democratic party, and having like Mr. Darnes, been unsuccessful in office seeking, was induced to try his fortune with the party composed of the fragments of all parties. After an absence of an hour, the committee returned, the report was read, was adopted, and then a little more speechifying. About 10 o'clock a motion was made to adjourn which was negatived, the chairman then slunk from the house, the meeting resolved itself into a committee of the whole without a chairman. Mr. Trotter was then called, and delivered a very elo-

quent speech, throwing Darnes into the shade, after which the modern cataline was called but dared not face Trotter, so the meeting adjourned at half past 11 o'clock. Thus ended the first meeting of the Trotter and Darnes party."

"Sardanapalus."

THE SPEECHES TO THE JURY.

MR. CROCKETT FOR THE PRISONER.

Mr. Crockett. Gentlemen: What is the charge upon which Darnes stands arraigned before you? He is not charged with having *intentionally* caused the death of Mr. Davis; on the contrary, the indictment distinctly confesses that he committed the assault "without intending to effect death," and "in the heat of passion;" and the jury cannot, if they would, find for any greater offence than that charged in the indictment, which is manslaughter in the third degree. But I hope to be able to convince you, if you are not already convinced, that Darnes, if he be guilty at all, has at most been guilty of but manslaughter in the *fourth* degree and not in the third as charged. But I believe I shall be able, before I am done, to satisfy you that he is guilty of *no offence whatever*, and that it is clearly a case of excusable homicide. The statute of this State provides, that if it was done "in the heat of passion, upon a sudden and sufficient provocation, or upon sudden combat without any undue advantage being taken, without any dangerous weapon being used, and not done in a cruel and unusual manner," then it is regarded by the law as excusable homicide, and it is your duty to acquit the accused. One part of the indictment we confess to be true, to-wit: that this offence, if any has been committed, was done in "the heat of passion." It is not improbable, however, that the counsel for the State will contend that Darnes gave such evidence of coolness and deliberation, that his conduct utterly repels the idea, that it was done "in the heat of passion." They will probably argue that there was ample time for his blood to cool after the provocation and before the affray. The fact that the indictment, on its face, *admits* it to have been done in the heat of

passion, is a sufficient reply to these arguments. But is it not absurd to talk of coolness and deliberation under such circumstances as those which surrounded Darnes? In the *Argus* of that morning he was denounced in language of the most abusive and insulting character. He was then smarting under the application of the most degrading epithets, and writhing under the operation of the slanderous charges which were then, for the first time, connected with his name. I need not, I am sure, call your attention to the fact, that the abuse of a newspaper is infinitely more aggravating than any verbal slander *can* be. The paper goes upon the wings of the wind to all parts of the country, bearing the defamation and disgrace of its victim to the thousands who read it—to his ancient friends at the home of his childhood—to his father, mother, brothers and sisters. No man who cherishes in his bosom a spark of honorable feeling, could be calm and deliberate under such circumstances. On that unhappy morning, Darnes is jeered and taunted at every corner of the street. Mr. Simons said to him, "Well—they have given you a dose of *small letters* this morning," alluding to the types used for his initials in the *Argus*; Mr. Anderson says, "You have caught hell in the *Argus* of this morning;" and even his particular friend, Mr. Hendry, by way of soothing Darnes' already irritated feeling, said to him, "You have been badly used, but you are afraid to fight Gilpin." Under these most exciting circumstances, is it not ridiculous to argue, that Darnes could have been *cool* and *deliberate*.

The next inquiry is whether the injury was inflicted upon Davis "with a dangerous weapon." What then constitutes a dangerous weapon in the estimation of law? Is every instrument with which it is *possible* to inflict death "a dangerous weapon?" Most unquestionably not. The only rational conclusion is, that it is a weapon from the use of which, in the ordinary manner, death would *probably* ensue—such as bowie knives, pistols, heavy bludgeons, &c. I could inflict death with a pin, a small stick not longer than

your finger, a bodkin or a pen-knife; and yet it would be supremely absurd to argue, that in contemplation of law, these are dangerous weapons. It is perfectly evident that Darnes did not consider the cane in question a dangerous weapon; for when repeatedly warned by Johnson and others, that his life was threatened; when he was told over and over again, that he would act like a fool in seeking an explanation from Davis, without taking a brace of pistols in his pocket, he invariably replied, that he considered it unnecessary; that he had no doubt the matter would be amicably adjusted so soon as he could have an interview with Mr. Davis. If his object was to procure a dangerous weapon, why did he not, when he purchased the cane from Phillips, select one of a more formidable character? There were a variety of sword-canes and others offered to him by Phillips, which were *unquestionably* dangerous, and withal most efficient and formidable weapons; and if he had intended any serious bodily injury to Davis, he was either a fool or a madman to go so poorly armed—carrying with him, a slender iron cane, but three-sixteenths of an inch in diameter and which the crowd who witnessed the affray, considered but as a switch or a riding whip. Even after he made the attack, he at first used but the small end of the cane, and it was only after Davis, as is to be supposed, refused all explanation, and under the excitement of heavy blows dealt upon him by Davis, that he turned the cane and used the other end. Even then, he used it only in the manner usual upon such occasions; none of the crowd attempted to interfere, because, from the harmless nature of the instrument employed, they did not believe that Davis could be seriously injured. For these reasons I conclude, that the cane was not a dangerous weapon.

We come next to the important inquiry whether, in this case, there was “sudden and sufficient provocation?” Upon the appearance of the article in the *Argus* of 30th May, Darnes wrote a gentlemanly note of inquiry to Davis, which was returned with a most insulting reply; and his own

impulse was even then, to write *another* note—to try *once* more, the effect of pacific measures. But Monday morning comes—he sees the article in the *Argus* of that date, teeming with falsehood, and containing a most base and scurrilous attack upon his character. Almost the first line of this article embodies a falsehood—where it speaks of the “blackguard style” of Mr. Darnes’ note; that note is before you; and your own judgments will decide as to the truth of the assertion. I trust I need not now trouble you with a dissertation upon the value of character. A celebrated English poet has justly said—

“The purest treasure mortal times afford,
Is spotless reputation. That away,
Man is but gilded loam.”

Under the circumstances, it was not only the privilege, but the imperative duty of Darnes to seek for reparation. Public opinion demanded it of him. But you will doubtless be told, that he should have appealed to the “majesty of the law,” and instituted an action for libel against Davis. I hold that there are some injuries for which the law affords no adequate redress, and there are some feelings in the human heart, above, and superior to all law, save the law of nature, whence they spring. There is a principle inscribed upon the human heart, by the finger of God himself, which teaches us to resist when trampled upon. Need I say that it is *the law of the West*, approved and sustained by an enlightened public sentiment, to resist and resent indignities upon the spot where they are offered. Would either of you, gentlemen, consider it sufficient provocation to authorize resistance, if another should attempt to chastise you with a cowhide in the public streets? And yet an attack of this character, is as nothing, compared with the tortures springing from a tarnished reputation. The article in the *Argus*, sets out by designating Darnes as “a fellow;” a person not permitted to associate with gentlemen. He is also termed “a common street loafer,” and as if to give additional point to the insult, even the initials of his name are printed in

small characters. Were these charges true? If so, how happens it, that he associated with Davis upon terms of the utmost intimacy, until a few days before the affray? He is also termed "a fit subject for the vagrant act;" and it is said "he had the *impudence* to send a note to Mr. Davis." For my life I cannot imagine in what the impudence consisted, unless it be, that Darnes, being a poor young mechanic, without friends, save those acquired by his own integrity and industry, should not have *presumed* to address a polite note upon any subject, to so august a personage as the conductor of a public press. I hold, that poor and humble as he may have been, he was at least entitled, like any other honest citizen, to receive the common courtesies and civilities of life. I have always been taught to believe that mechanics are a most respectable class in this community; and as expressive of the views which I entertain on this subject, I beg to be allowed to read you an extract from a speech delivered by one of the most distinguished orators in Kentucky (Hon. Benjamin Hardin) upon the trial of the Wilkinsons.²¹

It is precisely the same spirit of aristocracy, mentioned by Mr. Hardin which seems to pervade Davis' note to Darnes; and is a feeling which I am sure can never receive the sanction of an enlightened jury of this country. What offence against religion or morality had Darnes committed within the few days, since he and Davis were intimate friends, to merit such treatment? If all the Billingsgate abuse which was ever uttered, had been condensed into a few sentences, a more offensive article could not have been concocted than that which appeared in the *Argus* on the morning of the affray; and yet we are told, that for resenting this, in a manner tolerated amongst gentlemen, Darnes should be denounced as a murderer and classed with thieves, burglars and other inmates of the penitentiary. I think no one can deny that the provocation was of a most aggravated character; and sufficient to have aroused the passions of any

²¹ 1 Am. St. Tr., pp. 260-262.

man, properly jealous of his honor and sufficiently careful in maintaining a spotless reputation. If Darnes had permitted it to pass without notice, he would have been more degraded in public estimation, than if your verdict should now consign him to the penitentiary. Even the felon's indelible brand—the shaved head and motley dress of infamy, are not so utterly degrading, as would have been his conduct, had he tamely submitted to the biting, torturing insults of the *Argus*.

And, gentlemen, it is a lamentable fact, which cannot have escaped your observation, that the newspaper press of the present day, has degenerated into a state of extreme licentiousness, which was utterly unknown in the earlier days of the Republic. I appeal to you as the friends of social order, to rebuke by your verdict, on this occasion, the outrages perpetrated by partisan editors against private character. If you condemn him, who chastises the editor or publisher of a newspaper for an unwarrantable attack upon his character, you say to these editors and publishers, "go on in your work of defamation; slander whom you like, and if your victim attempts to molest you, a jury of the county will consign him to the felon's fate." What were newspapers designed for? To become the channels of individual malice and for the aspersion of private character? Surely not. They were intended as the medium of useful information upon commerce, literature, politics, science, agriculture and the arts. But they have now degenerated into such a state of licentiousness and corruption, as to require that every man who regards the purity of public morals, should set his face against them. When an unoffending citizen is liable to have his name paraded before the public in the columns of a newspaper, it is high time that this state of things should be looked to. Many an editor of the present day, instead of being a high-minded, honorable man, becomes the mere retailer of private slander. I do not of course allude to any individual cases; and would be understood as speaking only of the *mass* of the political newspaper press of the day, to which I am gratified to say, there are many

most honorable exceptions. According to the most polished and profound of modern poets:

"A man must serve his time to every trade,
Save censure; critics all are ready made;
Take hacknied jokes from Miller got by rote,
With just enough of learning to misquote;
A mind well-skilled to find or forge a fault;
A turn for punning, call it Attic salt;
Fear not to lie—"Twill seem a lucky hit,
Shrink not from blasphemy—"Twill pass for wit,
Care not for feeling—pass your proper jest,
And stand a critic—hated, yet caressed."

By substituting "editor" for "critic" you will have a most graphic picture of a majority of the partisan editors of the present day. Nor need I now remind you, that for the injured party to have recourse to the law to check their outrages would be a ridiculous mockery. The very idea of sending the sheriff in pursuit of a man who has abused you in the newspapers, in the present state of society in the West is preposterous in the extreme. Whoever should do it would be instantly denounced as that most odious of all living creatures—a *pale-faced coward*.

And whilst upon this branch of the subject permit me to occupy our attention for a moment with an extract from one of the most eloquent speeches I have ever read, the speech of Mr. Prentiss of Mississippi, in defence of the Wilkinsons (reads from his speech).²²

Such, gentlemen, we are told is the law of Kentucky, and as a native of her soil, I confess myself proud of the compliment paid to the chivalry of her sons. Such too, I am convinced, *you* will decide to be the law of Missouri. But to bring this case within the definition of excusable homicide, although the act was done in the heat of passion, upon sudden and sufficient provocation and not done with a dangerous weapon, yet it is incumbent on me to show, that it was done, "in a manner neither cruel or unusual." In arriving at the meaning of this paragraph, the words "cruel

²² 1 Am. St. Tr., pp. 223-224.

and unusual manner'' must be construed with reference to the instrument employed. Should one person beat another in the heat of passion, with a small rod or a switch, by striking him over the shoulder or across the body, it would be using the instrument in the usual way; and if death should accidentally ensue from a wound thus inflicted, it would clearly be a case of excusable homicide within the meaning of the law. But if the person thus using the rod or switch, should overpower his antagonist, and whilst he was prostrate on the ground, should intentionally thrust the end of the rod into the eye or other vital part of the body, from which death should ensue, the party inflicting this cruelty would not come within the provisions of the statute defining excusable homicide; for the simple reason, that he had caused the death of his antagonist by using an otherwise harmless instrument, "in a cruel and unusual manner."

These arguments however, gentlemen, have all been based upon the supposition that Davis came to his death, as a necessary consequence, of the blows inflicted by Darnes. I shall endeavor to demonstrate, that the injuries received from Darnes did not necessarily produce death. On the contrary there are very reasonable grounds to suppose that the medical treatment he received was the immediate cause of his death. This is a question, however, to be solved by the opinions of physicians, and upon the authority of medical books. I will here take occasion to remark, that so far as I have any knowledge, the physicians called by the prosecution are gentlemen of scientific attainments and skilled in their professions. I would not wantonly say aught to injure their reputations or wound their sensibilities; but to do justice to my client it becomes necessary to examine the method of treatment adopted; and I shall speak of it in such terms as are warranted by the testimony and by the weight of medical authority. You can convict in this case only upon the supposition that death was the necessary result of the injuries inflicted; for if the wound be not in its nature mortal, but afterwards becomes so, owing to the unskilful treatment of the physician, 'tis the doctor and not

the blow that kills the patient. In illustration of this, suppose one person to inflict a slight wound upon the finger of another, which could not be considered even dangerous, much less mortal. The injured party applies to a physician, who adopts a most unskilful treatment, causing first inflammation, then mortification, and finally the death of the patient. Could it be argued, except by a monstrous perversion of law and justice, that he who inflicted the injury, thus harmless in its nature, was guilty of the death of the party?

And here, gentlemen, another human provision of the law applies with peculiar force. It is this: that the prisoner is entitled to the benefit of every reasonable doubt, which you may entertain concerning any material fact involved in the cause. It is not therefore incumbent upon us to demonstrate *beyond all reasonable doubt*, that Davis did not die of the wounds received from Darnes. On the contrary, the prosecution holding the affirmative of the issue, must prove beyond a reasonable doubt, that he *did* die of those wounds; and failing in this it would of course be your duty to acquit the accused. It will be sufficient for my purpose therefore, to show that there is, to say the least of it, just ground to doubt, whether Davis would not have recovered except for the medical treatment adopted by the physicians. Three physicians of respectable standing have testified on behalf of the prosecution; and three others of equal intelligence and respectability have been called by the defence. They differ widely in opinion and it becomes your duty carefully to examine those opinions and compare them with approved medical authorities. But you will not lose sight of the fact, that the three who testified on the part of the prosecution, were the attending physicians of Mr. Davis; consequently their surgical reputation is deeply involved in the result of this investigation; and without believing or intending to insinuate that either of them would intentionally commit the slightest impropriety, here or elsewhere, yet I need not remind you, that where their personal interests are involved, men of the highest reputation and with the purest intentions imaginable, may be and often are de-

ceived. On the one side then, you have Drs. Beaumont, Sykes and McMartin—the attending physicians,—on the other, Doctors William Carr Lane, White and Knox,—the former of whom is a gentleman of great experience, having been for some years a surgeon in the U. S. Army, and as skilful in his profession as any other in the State of Missouri. Drs. White and Knox are also gentlemen of great intelligence and high professional character. These gentlemen testify that from the description of the wounds as given by the witnesses, it is by no means impossible, nor very improbable that Davis might have recovered by the application of the usual remedies, and without the use of the trephine; they testify that the trephine is a dangerous instrument, and only to be resorted to in the last extremity.

I shall now show that the symptoms which alone justify its use, were not present in this case. I take it to be well established by medical authority, that the trephine is never to be applied, except where compression of the brain exists; and that depression of the skull does not necessarily prove that there is compression of the brain. (Liston's Surgery, page 29.) Take then the symptoms of compression as given by Liston, and *not one* of them existed in the case of Davis. The question next arises, whether the application of the trephine is in any case proper in the absence of the *symptoms* indicating compression. Gibson in his treatise on surgery, page 358, distinctly asserts that, the surgeon should always be certain that the *symptoms* call for the operation and not the mere external appearance of the fracture. In the case of Davis *none* of the symptoms were present, and the operation was performed from the mere external appearance of the fracture. Dorsey in his work on surgery, (which I believe is considered very high authority) asks the question whether the operation should ever be performed where depression exists, to prevent or remove inflammation? He answers the question in the negative; and yet Dr. Beaumont testifies that he did operate on Davis for that purpose. In my opinion, the weight of authority clearly proves that the surgeon should wait for *symptoms of compression* and never

apply the trephine, (at all times a most dangerous instrument) for fear that inflammation *may* ensue. In support of this opinion, I will read to you several cases which occurred in the practice of Sir Astley Cooper, the most accomplished surgeon of the age. (Cooper's Lectures 109.)

These cases were all far more dangerous than the case of Davis; yet no operations were performed and the patients recovered. Are you, gentlemen, so firmly convinced, that Davis might not have recovered by the use of the ordinary treatment, that acting upon that belief, you are willing to consign the accused to the walls of the State prison? I trust you will incur no such awful responsibility to your conscience.

In conclusion, gentlemen, permit me to say that throughout this defence we have attempted no appeal to your sympathies. 'Tis justice, not compassion, that we ask. It is not, however, inconsistent with this sentiment to say, that in reviewing the conduct of the accused, you should remember that, like all others of our race, he is subject to human passions and imperfections. In some parts of this transaction he may have committed error; if so, they were errors of the head and not of the heart. But in consideration of the frailty of our nature, it is a component part of our system of jurisprudence, that the law is to be administered with lenity and justice tempered with mercy. I conclude by commending to your consideration this human principle of our law so beautifully enforced by the immortal poet when he says, that—

"No ceremony that to great ones 'longs,
Not the king's crown, nor the deputed sword,
The marshal's truncheon, nor the judge's robe,
Become them with one half so good a grace,
As mercy does.
Why, all the souls that were, were forfeit once;
And He, that might the 'vantage best have took,
Found out the remedy: How would you be,
If he which is the top of judgment, should
But judge you as you are? O, think on that;
And mercy then will breathe within your lips,
Like man new made."

MR. GANTT FOR THE STATE.

MR. GANTT. *Gentlemen of the Jury:* I must begin at the speech with which Mr. Allen opened the defence, and in which he thought proper to go out of his way, to cast upon me imputations as undeserved and gratuitous as they were irrelevant to the question of the guilt or innocence of the prisoner. He entertained you first with a statement of my having on one occasion carried a note from Mr. Carroll to Mr. Gilpin, which note, as the gentleman speculates, *might* have led to a hostile meeting, and by some double possibility, I might have figured in the character of second to a principal in a fatal duel. He chooses to regard me upon the strength of these suppositions, the imaginary accomplice in the murder of a man who is perfectly well, and likely so to continue; and he exultingly contrasts this ideal position with that which I claim for myself on the present occasion. He asks, with an appearance of much triumph, what pretensions I can make to the character of an observer, and a venerator of the majesty of law, and the sacredness of social order, and a friend to established government; when he can thus, in imagination, place me in an attitude so directly antagonistical. It is impossible not to admire the gentleman's ingenuity; but we should stare if we were told that, on account of any thing pictured in these flights of his imagination, the prisoner is more or less guilty of the charge in the indictment. So far as his anecdote may affect me or my principal on that occasion, I can institute a comparison highly favorable to us both, when contrasted with the conduct observed by others under circumstances not very dissimilar. But I am not of Mr. Allen's opinion, if he thinks that the case before you is so meagre and destitute of circumstances as to require the intermixture of extraneous matter. In truth, I do not consider that he so regards it; I am convinced he does not, but rather than draw your attention to any of the facts connected with it, he will lead you off to any mentionable subject; provided he engages your interest in

something different from the details, which individually and collectively testify to the prisoner's guilt, he cares not on what theme he descants, and if at the same time he can avoid a discussion of the facts of this transaction, and impugn the motives of myself and my colleague, he will doubly succeed in his aims. I intend to come to that discussion presently; but I put it to your candor, gentlemen, to say how far Mr. Allen has conducted himself with propriety or delicacy, in thus dragging into the present inquiry, a matter in which others are so intimately and exclusively concerned. Now, that the allusion is too plain to be mistaken, I will only ask you, if you think the matter worth a moment's time, to contrast my principal's communication and the deportment of us both, with that between which and itself a comparison has been instituted.

But Mr. Allen said that we pretend to be the guardians of law, and that we prosecute here in direct violation of the statute. Because we are neither of us the Circuit Attorney, duly elected, sworn and qualified. We are, therefore, Mr. Allen argues, unrestrained by any fears of responsibility—unchecked by the solemnity of the regular officer's oath, and not subject to the penalty provided by statute against that person, in case he is guilty of a misdemeanor in office.

But the oath is almost identically the same for us both—the penalty to each of us for malpractice and removal from office—the Circuit Attorney is liable besides to a fine; this is the whole difference. But if a gentleman's own sense of propriety and the sanction of a solemn oath are insufficient to deter him from doing wrong I know of nothing that can be relied on to insure his doing right. My present situation as prosecutor is surely not so agreeable that I should be solicitous to overstep the proper bounds in order to fill it. On the contrary it has been forced upon me by circumstances—it has become a duty from which I could not escape. I would gladly have avoided the task if I had not regarded it as a duty. It is only less painful than yours, gentlemen, because it is less responsible.

I will advert briefly to some of the promises Mr. Allen

made in his opening. But with respect to the proof that Davis had written the articles in the *Argus*, Mr. Allen has signally failed. When this assertion was met by a prompt denial and an expression of astonishment at its utterance, the gentleman found himself reduced to the poor evasion "that Mr. Davis *had* written the articles—by his amanuensis, *William Gilpin*." If this was not saying in candid language that Mr. Davis did not write them at all, it was at least as much as could be expected to be wrung forth from the confessions of exposed and defeated representation. But if it was a salvo which soothed his feelings it deceived no one else; it was a plain acknowledgment of failure and was so received and understood.

I will direct my remarks to the establishment of the following propositions: 1st. That Darnes killed Davis. 2nd. With an iron cane, being a dangerous weapon. 3rd. Without any of those alleviating circumstances which reduce the crime to excusable or justifiable homicide. One branch of the first proposition, viz: the inquiry whether Davis died of the wounds inflicted, will be reserved till the others are disposed of.

It seems hardly to be disputed that Mr. Davis received, in an encounter with Darnes on the first day of June last, several wounds of which death was the consequence. There are so many witnesses who described the assault that to dwell on the testimony of each would be a very tedious and unnecessary task; for in place of taking so long a road to the goal I will adopt the statement of one of the witnesses who was called and examined on the part of the defence. They can scarcely object to his account of the transaction, and we are quite content to abide by it. The witness I refer to is Mr. Loring and his testimony is much to the purpose in every respect.

It was asked by the counsel for the defence, whether there was not an attempt, or an indication of an attempt, on the part of Mr. Davis to draw a weapon at this juncture. The answer of the witness was clear and decisive—he saw no weapon, nor any appearance of an attempt to draw one.

The witness stated that the larger man proved to be Darnes, and the smaller man proved to be Davis—and this made his testimony complete and unambiguous. We are content to adopt this statement of their own witness. It agrees with the testimony of others, whom we have examined, except that the position of Mr. Loring did not allow him to see some comparatively unimportant attending circumstances. Mr. Loring states, however, that the manner in which the umbrella was used seemed directed rather to shielding the person who held it, than to attacking his opponent. He conveyed this impression more by gestures than by words, and the testimony on this point is recommended by this circumstance; for Mr. Loring showed us in what manner the umbrella was held and moved, i. e. in a horizontal direction and moved from right to left, to parry the blows which Darnes was showering down. It is clear that the umbrella was used for the only purpose to which it was applicable—it was useless for inflicting a blow in return.

The facts of the assault and beating being thus shown beyond contradiction, and by the witnesses on both sides, let us enquire into the circumstances that preceded it, and see how they justify the conduct of Darnes. Mr. Darnes' counsel have said that the articles that appeared in the *Argus* were of such an aggravating character as to call for and justify extreme violence on the part of the prisoner; and in support of this position they have argued at some length. It is for you to say to what purpose. "Mr. Darnes," say the gentlemen, "was abused and insulted; debasing epithets were applied to him; he was stigmatized as a common street loafer, a fool and a coward." Then comes Mr. Allen's argument in favor of club-law. He began by reading a part of Mr. Rowan's speech, in the case of the trial of the Wilkinsons, in which that eloquent advocate defended the doctrine that a citizen might lawfully kill any one who should attempt to degrade him, by the infliction of a cow-hiding or a horse-whipping. Mr. Allen says, if a man is justified in repelling an attempt to cow-hide him, by the most violent means, and in wiping out the affront in

the blood of the assailant, equally is the man whose character is impeached, justified in an appeal to violence. And, which of you, gentlemen, can doubt (Mr. Allen goes on to say) that in the first case the attacked person would be perfectly justified in using any means to kill the man, who endeavoured to destroy him by the disgrace he would inflict? As little can you doubt, that in the last case, the attack is equally called for.—Public opinion demanded it in the case of Mr. Darnes; every one expected an assault upon Davis; and it was approved beforehand by the most peaceful and order loving citizens of St. Louis. The attack was made under circumstances (Mr. Allen goes on to state) which shows the merciful and humane dispositions of Mr. Darnes' breast; he provided himself with no weapon. He fully believed no assault would be necessary; he expected that an explanation from Mr. Davis would set every thing to rights, and that they would immediately resume their friendly relations. That Mr. Darnes went up and accosted Mr. Davis—that Mr. Davis must have insulted him very grossly, (for how else could such a forbearing and long-suffering man as Mr. Darnes is shown to be, possibly entertain a thought of harm to mortal?) and that then Mr. Darnes struck him with his hand—that a fight ensued, in the course of which Mr. Davis received some injuries which the unskilfulness of his surgeons rendered mortal. Mr. Crockett adopts this argument almost word for word, and of course my argument applies to him also.

I will attempt to show how baseless are all these theories. The doctrines advanced are in part as flagrantly absurd as ever rendered refutation unnecessary; but some of them are at least as pernicious in their tendencies as they are ridiculous in a logical point of view; and to these I will direct your attention.

You are told that by every law, written and unwritten, it is competent for anyone to kill the man who assails another with a degrading weapon; that this law is not found in the statutes, but is the dictate of an authority paramount to them; that it is founded in public sentiment,

which will punish any infraction of its enactments with a certainty from which there is no escape. How far a man is justified by law in killing a person who attempts to horsewhip him, is a question which will be decided when it is raised. So many circumstances invariably accompany every such an attempt, that no one case can be relied upon as an authority for another; but I say, without fear of contradiction, that the conditions which render homicide justifiable or excusable, must be found among those enumerated in the fourth and fifth sections of our act of assembly defining crimes and punishments, and that unless the killing of a person who attempts to horsewhip another, can be brought within the saving of the second clause of the fourth section, as I believe it can be, then such killing must be at least manslaughter. But the case before you has nothing whatever in common with the defence of one's person from outward harm. In this case Mr. Darnes was the assailant—he made the assault and with a weapon which I will presently show to be in the highest degree dangerous; and without any reason, except the malignity of his own revengeful feelings, he pursued his deadly purpose until it was consummated by the destruction of Mr. Davis. As little has the passage which Mr. Crockett has read from Mr. Prentiss' speech in the same trial (that of the Wilkinsons) to do with the defence set up here. Darnes was not defending himself; he was not defending a brother; but he was butchering a man whom, the defendant's counsel would have us believe, he valued and loved *like a brother*. Lawlessness has made a fearful stride when it has enlisted in its support such a person as Mr. Allen; when I see an individual of his high character for moral and religious correctness of demeanor, unblushingly and unhesitatingly say, that the injury which Mr. Darnes sustained, was such as could only be wiped out by blood, I am confounded and alarmed. When such as he advocates these extremes of violence—violence, too, which calls to its aid all the assistance of circumstances which convert a mere assault into assassination, I may well fear that the evil has taken a

deep root, and extended its branches widely. That gentleman is the last from whom I should have expected the utterance of such monstrous and abominable sentiments; he is a member of a Christian Church—a Church, too, beyond most others, distinguished for the strictness of its principles; yet they seem to be unable to prevent the feeling or repress the utterance of the sentiment, that revenge of the bloodiest kind may lawfully and justifiably be taken for a mere verbal provocation. I would sooner that my right hand should rot, than that such opinions should pass into law; but when such men as Mr. Allen entertain them, I may fear that Mr. Crockett's declaration that the laws are in most cases of personal injury, an empty mockery, is not the unfounded aspersion upon our administration of justice which I once would have regarded it. But I will not believe that such doctrines extend beyond the prisoner and his counsel, until I see irrefragable proof that they are generally adopted as the sense of the community in which we live; and I will trust to you, gentlemen, to defend the community, of which you are the guardians, from such an atrocious libel.

The next position of the ingenious counsel is, that "public opinion demanded and justified the assault by Darnes upon Davis." Even if it had, it would not have amounted to a justification in law, and would as little have extenuated the moral guilt of the offence. But the truth is, public opinion justified and demanded no such thing, and the citizens of St. Louis are foully slandered when it is asserted that they approved the killing either beforehand or after it was over; some few persons, it is true, did expect an attack; but by whom, and upon whom? Why, as you have all heard, by Darnes upon *Gilpin*! All who heard Mr. Darnes threaten Davis remonstrated with him upon the impropriety of his selection; but Darnes knew better—he knew there was less danger in the enterprise which he meditated, than that to which the sense of those to whom he communicated his intention, would have prompted him. He knew he had made a judicious selection. I say selection, for never was a more

studious respect paid to persons—and his knowledge of Mr. Davis' habits enabled him to know that Mr. Davis was unpractised in the use of weapons—and he also knew that Mr. Gilpin was expert in the handling of fire-arms. Hence it was that he considered Mr. Gilpin "beneath his notice." Such an imputation upon the character of Mr. Gilpin attracts no attention now, coming from the source to which it is traced: it had not its origin *then* in the convictions of the person making it, but in his assurance that Mr. Gilpin was more "cunning of fence" than the man of *his* choice. "Public opinion," so far as that mystical something was represented by the loose expression of those whom the different witnesses mentioned, required an attack upon *Gilpin* and *not* Davis; and if, as Mr. Allen says, Mr. Darnes would have been dishonored by not attacking, in obedience to "public opinion," and so rescuing himself from the imputation of cowardice, he is still dishonored by having attacked a man with whom no one imagined he would have a collision, and by having shunned to attack a man who had in the most open, unambiguous manner, avowed himself the author of the pieces of which he complained, and invited to himself the violence with which Darnes threatened Davis. The defendant gains nothing by his assumed deference to "public opinion;" he was far from accommodating himself to its behests; he departed from its requirements to suit his own purposes and with an eye to his own safety. No, gentlemen! deference to "*public opinion*" was not his motive; had it been, he would have taken pains to inform himself of the real colour of *public opinion*, and he would have learnt that *public opinion* justifies no such barbarity, no such *calculating* cruelty as that which distinguished him on that occasion.

The defendant's counsel are involved in a trifling contradiction at this juncture. They say at one moment that Darnes expected that an explanation with Mr. Davis would set every thing right. Again, they say, he attacked in obedience to public opinion—at one and the same moment he intended to assault Mr. Davis, believing that such a course

was imperative, and at the same time he met him in a friendly spirit, believing that no assault was then, or would become, necessary. The evidence before you is that Mr. Darnes, some time in May last, changed his political course, and joined himself to those of whom he had been till then an active opponent—upon this an article, signed “Sardanapalus,” appears in the *Argus*. There is nothing in this paragraph which might not have been expected from the circumstances in which the defendant was placed. It is invariably the case that strong denunciation follows a change in political faith, and Mr. Darnes had no reason to imagine he would be an exception. The terms of intimacy which he had maintained with the proprietor of the *Argus* were rather calculated to add to the resentment, which a former political friend would feel towards one whom he regarded as a traitor. But in reality the proprietor of the *Argus* had nothing to do with the article signed Sardanapalus, and Darnes knew this well, as his conduct clearly evinces; for what does he do in return? Does he attack Davis, or even ask him for an explanation? No such thing. He procures the composition of an article, signed “Anti-Sardanapalus,” in which the coarsest and most vulgar abuse is poured out unsparingly—a total disregard, both of the truth of the charges, or the propriety of their expression. But all this tirade is directed towards, *not* Mr. Davis, but Gilpin!—Upon his devoted head does the storm descend; against him are levelled the choice epithets which were too sublime for the unassisted mind of Mr. Darnes, and to produce which he had recourse to the aid of some one who had taken a degree in blackguardism. This precious article, you will perceive, is a clear attack upon Gilpin. It is a proof that Mr. Darnes fathered the article, though he says he did not actually write it. This article is adverted to, to show you that Mr. Darnes commenced the war, and made Mr. Gilpin the object of his attack. We will now show you that when he found that Mr. Gilpin was likely to prove an ugly customer, he suddenly turned off and demanded of Mr. Davis to stand in the place which Mr. Gilpin alone should occupy,

and which Mr. Gilpin had shown himself ready and anxious to fill. A correspondence ensued between Mr. Darnes and Mr. Davis, touching an article in the *Argus* of May 30th; Mr. Darnes, imagining the article directed to him, addressed a note to Mr. Davis requiring an avowal or disavowal of its application to him.

Now, gentlemen, I will ask you, and abide by your decision—was this such a note as Mr. Davis *could* answer in a manner that would satisfy Mr. Darnes? Did not the offensive and injurious allusion to Mr. Gilpin forbid that his friend and associate should, even tacitly, sanction so gross an attack upon his character? If Mr. Davis had given Mr. Darnes a reply, without taking notice of his reference to Mr. Gilpin, would not every one have said, “He has not properly regarded the effect of passing the aspersion in silence—he has tamely compromised his friend.” Such would have been the effect of such conduct, undoubtedly, and such would be the denunciation his conduct would have deserved. What, then, was he to object to answer Mr. Darnes’ note, and assign for reason, the nature of the contents? He did so; but he did more—he did not consider Mr. Darnes the wire-worker—he regarded him as the puppet merely. With a view to reach the real object whom he believed he had most reason to fear in this matter—with the intention of setting his actual enemy face to face before him, and daring *him* openly to his worst, he adopted a course, which is universally considered as imposing upon the bearer of a hostile message, the duty of standing in his principal’s stead. With the direct intention of extracting from Mr. Grimsley the challenge which he saw that *Darnes* was likely to send him, and determined that the person, principally concerned in attacking him, should at least run all the risk attending the step, he added to his objections to the nature of the contents of the note, *another objection* drawn from the character of the *author* of it.

This note was intended to fix upon Mr. Grimsley the *onus* of standing himself in the front of battle. Mr. Darnes, upon the receipt of this note, wishes to write another to Mr.

Davis, asking for explanations; but his own advisers say to him that there is no room left for any step of that nature, and Mr. Grimsley refuses to be the bearer of such a note. On Monday, the morning of the catastrophe, an article of a most uncompromising nature appears in the *Argus*. Indignant at the attempt which he distinguished, to substitute for himself another, who might prove a less stubborn foe, justly angry at the reckless attacks made upon his character and standing, and determined that there should be no excuse for any misapprehension as to the relative responsibilities of himself and Mr. Davis, Mr. Gilpin adverted in a strain of sharp invective to the conduct of Mr. Darnes. He denounced him in the most decided terms—exposed his motives in applying to Mr. Davis to interpret *his* articles, and in the most clear and positive language declared that he alone was answerable for everything that appeared in the *Argus*, under the editorial head. Mr. Gilpin evidently wished to give to the world an assurance that he was the only man who was *personally*, in the way of personal, physical contest, chargeable with the character of those editorials. We do not wish to limit the responsibility of proprietors; but their knowledge of the articles in their papers is constructive—it is a legal fiction and presumption. In point of fact, we know that it often happens that the proprietor has no actual knowledge of the articles in his paper, but the law *presumes* he has such knowledge and will admit no proof to the contrary. Therefore, whenever he is legally held to answer either civilly or criminally for the contents of his paper, he is not allowed to show that he was not acquainted with their tenor. But does not every one perceive that when the *true* author avows himself, no recourse lies to the *constructive* author, for the purposes of personal satisfaction? Accordingly, when Mr. Gilpin thus pronounced himself the man to whom Mr. Darnes and others must look, if they meditated revenge, Mr. Davis was entirely warranted in supposing that the animosity and the violence of Mr. Darnes, at least, would be transferred to the avowed editor. Mr. Grimsley he had directly affronted,

and him he must expect to answer; but he must have considered Mr. Darnes as disarmed, towards him, from that hour.

“But,” the gentlemen repeat, “Mr. Darnes wanted an explanation.” What possible reason had he for expecting an explanation? Of what nature was it to be? Did he wish to know from Mr. Davis’ own lips, whether or no he was the author of the offensive article of June 1st (for you must bear in mind, gentlemen, that it is the article which the counsel of the prisoner rely upon to show provocation.) Such a purpose could not be entertained, for Mr. Gilpin had loudly and distinctly declared himself the author. Was he to learn from Mr. Davis the *meaning* of the article, or whether it was intended to be applied to him? It was too uncompromising, too decided, too plain and perspicuous to admit a doubt of its import or its application—it could not be explained away. There is nothing in the English language which may not have two different readings, if this article can have more than one, and that too, a perfectly obvious meaning. It was not a subject for explanation, and Mr. Darnes knew it; he did not go to meet him with any purpose of asking or receiving one. He armed himself with an iron cane and a bowie knife, and waited for Davis in the most public part of the city. Nothing that could forward his aims, supposing them to be directed to obtain an explanation, was observed by him. All his actions show that he had another purpose. He purchased the cane at Mr. Phillips’ store; he asked in the first instance for a hickory cane, but at the suggestion of some one, who seems to have been a stranger, changed it for an *iron* cane with a leaded head, such as the witnesses have described to you. He then goes to the National Hotel, not to seek an amicable adjustment of his difficulties with Davis, but to chastise him, according to his expressed intention. Many witnesses have testified to this. Mr. Johnson states it in his testimony; so does Mr. Walker. What is his appearance at the National? He is marked by symptoms of strong excitement. Some of the witnesses think he looked frightened, but others

say that he was merely pale. It was the paleness of determination. He had made up his mind to a deed of violence which he himself could not contemplate unmoved. He waits the approach of Mr. Davis, and immediately advances to meet him. We can never know what passed at that conversation—but little could have been said on either side. Mr. Simons saw Mr. Darnes going out of the National towards Davis; his attention was called away for a moment, and before he could turn again, the parties were engaged. This shows how short the conversation must have been. It is established that the first action of Darnes was to strike a blow on Mr. Davis' face with his hand, and then followed the shower of blows which all the witnesses have described; but for the determination of the number and character of which I refer you to Mr. Loring's testimony, and for the reason already mentioned—because he is a witness called by the defence, and we are content to adopt his statements. Mr. Davis received more than a dozen blows of the cane with the small end. Mr. Loring says that blows were aimed in return with the umbrella, but he cannot say that any of them struck Darnes. Indeed, the direction given to the umbrella indicates with a clearness not to be mistaken, that there was no attempt made by Davis, except to defend himself against the murderous assault, and this direction is described more by gestures than by words, and thus becomes doubly expressive. It was in this attack that Davis received the wounds of which he died. After he had been driven back, and his umbrella broken by the repeated blows, Darnes turned the cane and used it like a maul; he dealt Mr. Davis at least four blows with the leaden end, and every blow shivered the skull. He was then separated, and Mr. Davis was committed to his friends and surgical treatment. Nothing that could be done was left untried; skill was uselessly exhausted; but the injuries were beyond the reach of human aid, and the wounds resulted in his death on the eighth day.

But the counsel insist, "The cane is a harmless instrument—it is not a dangerous weapon." If it be not a dangerous weapon where shall we find one? If a cane, every blow of

which is capable of breaking the skull, be not of a deadly nature, what contrivance of human ferocity deserves the name? *Dangerous* has no meaning in the statute, which it has not in ordinary every day use. The language in which the Legislature expressed themselves was such as they understood, and such as they intended the citizens of the State to understand; and it is unnecessary to refer to the wisdom of judicial decisions to determine the import of an expression which our Legislature used in its common acceptation. I refer to Webster's Dictionary for the signification of the word dangerous. It is in these words: 1. "Perilous; hazardous; exposing to loss; unsafe; full of risk: 2. Creating danger; causing risk of evil." Of the word weapon he gives the following definition: 1. "Any instrument of offence; any thing used or designed to be used in destroying or annoying an enemy: 2. An instrument for contest or for combating enemies: 3. An instrument of defence." An instrument, the use of which causes risk of evil to the person against whom it is used; which creates danger when aimed against any one—is a dangerous instrument, and an instrument of offence—a thing which is used expressly and clearly with the design of "destroying or annoying an enemy;" and the use of which against that enemy will "cause risk of evil" to him, is a dangerous weapon. An iron cane with a leaden head, the diameter of which is three quarters of an inch, is a *most* dangerous weapon; a pistol is a dangerous weapon in the hands of an expert marksman, and when aimed at an object within its range; but I would much prefer that the most skilful marksman in this State should deliberately discharge at me, at the distance of ten paces, the best pistol that ever was the fruit of human mechanism, than that the weakest man on that jury should strike me with that cane a single blow upon the skull. In the first instance, I might *possibly* escape—the ball *might* miss the vital parts; but there would be nothing to hope for me after receiving one blow of that deadly cane upon the head. It is an affront to common sense to contend that such a cane

as Darnes used is not a dangerous weapon; and it is a waste of time to refute such an absurdity.

But it is said the killing was not done in a cruel and unusual manner. I know nothing of the nature of cruelty if this be not cruel; and it is a matter which addresses itself plainly to every understanding. If beating out the brains of an unoffending and unresisting man, be not cruel, I must learn the meaning of words anew. If continuing to strike long after his victim, perhaps, had ceased to *feel*, be not barbarous, the tiger is merciful. "But it was not done in an *unusual manner*," and why, do you imagine, gentlemen? "Because," say the counsel, "we *usually* strike with a cane," so we do with a bludgeon or a sword, and the assassin stabs with his dagger. These are the usual means in which such characters execute their purposes; but is beating a man's skull to shivers the legitimate and natural employment of an iron cane? If it be, if such is its natural use, how fatal is the admission to their proposition, that the weapon is not dangerous or deadly! But this question needs no argument; and as little will I waste upon the inquiry whether an umbrella is such an instrument as places a man upon an equal footing, in respect to arms, with a man who wields an iron cane, terminating in a leaden head. If Mr. Davis had had a pistol in every pocket, he would not have stood on equal terms with Mr. Darnes. You know, every one knows how difficult it is to adjust any thing under excitement and in a situation of emergency; and those who have tried it can say that one of the most difficult things is to draw a pistol under such an overpowering attack. Mr. Davis was, unfortunately, not familiar with arms. He comes from a land where the use of them is not necessary for self-defence, and where the law fulfils its promise of protecting the life and rights of the citizen. But had he been the most skilful person in the use of arms and the practice of fighting, if he had held in his hand a loaded pistol, Darnes with his cane might easily have prevented his ever cocking it. Before he could make an effectual motion to prepare the weapon for use, he might be smitten

to the earth. His equality would be no more complete than if I were to hold a *cocked* pistol to the breast of a man who had pistols in his belt and a sword in its scabbard.

“But our statutes have changed the common law doctrine touching crimes and punishments.” True, they have, and they have accurately defined the extent of the change. It is by our statute that I wish you to direct your action, and it is by our statute that you have sworn to be guided. Such relaxations as it has made of the severity of the common law, are the exact definition which our accurate legislation has made of what it esteems the true limits of mercy. Beyond these you cannot strain it; it is no more competent for you, than for a judge to substitute the caprice of a moment for the solemn act of a deliberate assembly. Can you imagine that the legislature intended just to make every wise allowance for human infirmity, and then to leave it in the power of courts or juries to say—“Even these restrictions upon lawlessness may occasionally be dispensed with?” It vested in you no such power. Those who tell you that it did, deceive you. A criminal is brought before you, and a crime, clearly forbidden by law, is palpably shown to be within the penalties of the statute. The case is so clear that, after a mere show of argument the counsel for the defense openly and boldly ask you *to break thro’ the law*—and to encourage you to the enterprise, they point to some instances in which the deed has been done by juries of this State (as they say). While on this head, it is strange they omitted to state a *remarkably strong case*, one which is as available, or more so, for the purposes of their present argument, than any which now occurs to me. I refer to an incident which distinguished the session of the Arkansas Legislature, in 1837. The speaker of the house of Representatives of that body took umbrage at some difference of opinion, expressed by a member on the floor—possibly on a point of order. Be that as it may, with a view to correct or chastise him, he left his chair with a bowie-knife in his hand, and attacking the member, who was also armed with a bowie knife, he laid him dead in his place. Either a cor-

oner's jury, or the grand jury of that county, returned a verdict of justifiable homicide, committed in defense of the speaker!!! Undoubtedly, much encouragement is derivable from such deeds and such an administration of justice. I cannot doubt but it was the contemplation of this and similar pictures, that emboldened the counsel to avow the detestable, abominable doctrines they have unblushingly recommended to your adoption, and thus they have DARED to declare the excesses of ruffians, and the impunity they have enjoyed in unsettled parts of our country, to be the precedents by which courts of justice are to be governed; but neither from such instances, nor from the changes in the rigor of our penal laws, as compared with those of England, can an argument be drawn against the due enforcement of our express statutory provisions. But the lateness of the hour admonishes me that I must bring my remarks to a close. I pass to the consideration of the last point I proposed, viz: What was the nature of the wounds which Mr. Davis received, and did he die of them?

You will remember there were four distinct fractures described by the surgeons who attended the deceased. One on the prominentia frontalis; the second, a fissure or crack in the forehead; another on the temple; and a fourth, above the ear.

Besides these, there were several fissures or cracks in the skull, connecting the principal points of injury. Two of these fractures were compound, comminuted and depressed. The scalp was lacerated, the bone shivered into fragments, and portions of the inner table of the skull driven through the membrane and into the substance of the brain. The highest surgical talent which this city or this State can boast was invoked; but nothing could retard the fatal progress of the symptoms; Mr. Davis died on the eighth day, and you are told by Dr. Beaumont that the wounds were, "beyond a doubt, the proximate, immediate, and only cause of his death." Of the pieces of bone which were shattered by the blows, some were extracted when the patient was trephined; but others were so deeply imbedded

into the substance of the brain, as to elude search, and these were discovered only on the post-mortem examination. Does there seem to be any mystery here? Is there any thing in the nature of the wounds to render it surprising that death should result from their infliction? The gentlemen say that Mr. Davis was trephined—that trephining is dangerous—that, therefore, it is impossible to say, whether the death resulted from trephining, or from the wounds which rendered it necessary. The question then is, was trephining called for, by the nature of the injury? All the surgeons, who saw the deceased, concur in saying that it was emphatically called for—and, it is said by Dr. Beaumont that there was imminent danger in the least delay—that immediate operation afforded the only chance for saving the life of the patient—that there was a *mere chance* at best, but that even the faintest hope would be extinguished by deferring the operation of trephining. One would think that this testimony was decisive enough; but the gentlemen are not satisfied. They appeal from the opinion of the surgeons in attendance to the records of the wisdom of those who are regarded as the lights and guides of their science, and they have read largely from Sir Astley Cooper and Liston in supposed refutation of Dr. Beaumont's opinions. We refer to the opinions and authority of Sir Astley Cooper and Liston, too; and in support of the very doctrine for which we contend, and against which the gentlemen for the defense argue, we will appeal to the written opinion of these same distinguished surgeons, from whose works the gentlemen for the defense have quoted so largely. In order to explain why we thus, seemingly, refer to the same authorities for the maintenance of contradictory propositions, I will observe that this paradox arises from the unfair manner in which the defence have confounded the principles and practice, recommended in cases of *simple* fracture, and such as are applicable to the cases of *compound* fracture. You recollect the distinction taken between these two injuries—the first being a fracture of the bone without an opening by cutting, or tearing, or lacerating from the broken bone to the sur-

face of the skin; the second, a breaking of the bone, and a wound extending from the surface of the skin to the injured bone. This distinction was so lucidly stated by Doctor McMartin and Doctor Sykes, that it must be perfectly clear in your recollection. Now it is laid down with an earnestness and a frequency of repetition, which shows the convictions of the surgeons, whose written words you have heard read, of the importance of the difference to be observed; that in *simple* fractures rarely is trephining necessary, whereas it is almost universally necessary in cases of *compound fracture*. In the first instance, the surgeon who is called to examine a patient, does not immediately trephine; the patient *may*, and in all likelihood *will*, recover without it; but in cases of *compound fracture with depression*, the experienced surgeon usually sees but one path to safety, and that is by means of an *immediate* operation. When the fracture is not only compound and depressed, but the bones shivered and driven *through* the dura mater, or lining membrane of the skull, and into the substance of the brain, operation without delay becomes, in Doctor Beaumont's words, "one of the plainest indications in surgery." But the gentlemen for the defence have thought proper to read only such portions of Sir Astley Cooper's work as condemned trephining in cases of *simple* fracture—and this system of unfair and garbled quotation has characterized them in every thing they have read during the present trial, both in their reference to surgical and to legal authorities.

(Mr. Gantt read from Sir Astley Cooper's and Liston's lectures on the subject.)

Mr. Crockett has told you that if there be any room for rational *doubt* whether the remedies were not so injudicious as to divide the blame for the death, with the wounds received, a case is made out in which it is your sworn duty to acquit the prisoner. He did not quote any authority for this extraordinary doctrine, and when desired to name his reference, rested entirely upon his *general recollection of general principles*. I have no hesitation in telling you that

this is *not the law*, and I support my assertion by reading to you the rule on this point, from a work of the highest authority:

"If a man give another a stroke which, it may be, is not in itself *so mortal* but that with good care it might be cured, yet if he die of the wound within the year and day, it is homicide or murder as the case is, and so it hath always been ruled. But if the wound or hurt be *not mortal*, but with ill application by the party or those about him, of unwholesome salves or medicines, the party dies, *and it can clearly appear*, that *this* medicine and *not the wound* was the cause of his death, it seems it is not homicide; but then, that must *appear clearly and certainly* to be so. But if a man receive a wound, which is not in itself mortal, but, either for want of helpful applications, or neglect thereof, it turns to a gangrene or a fever, and that gangrene or fever be the immediate cause of his death, yet this is murder or manslaughter in him that gives the stroke or wound; for that wound, though it were not the immediate cause of his death, yet if it were the *mediate* cause thereof, and the fever or gangrene was the *immediate* cause of his death, yet the wound was the cause of the gangrene or fever, and so consequently is *causa causati*."

I have read the whole rule and the exception to it; I do not and will not follow the example of gentlemen on the other side. If no principle restrained me, I should not *dare* to misstate the law in presence of this Court, and attempt to support my misstatements by garbled and perverted quotations.

Thus you will perceive that it must *clearly and certainly appear* that the death was *not* ascribable to the wounds mediately or immediately, but to the medicine and medical treatment, in order to exculpate the person who inflicted them. It would be monstrous if a different doctrine prevailed. No surgeon could safely give aid to a wounded man, if the question should be permitted to be raised, whether the utmost exertion of human skill—skill such as only a Bell or an Abernethy could boast, or remedies such as only the light afforded by a post-mortem examination would suggest, might not *possibly* have led to a different termination; and if, in case there should be any reason to conclude that they would have led to a different result, the criminal is to have the benefit of the possibility, and the reputation

of the surgeon is to be proportionately jeopardized, a more injurious, unjust, and absurd principle would be asserted than can be charged upon our jurisprudence, or that of any civilized nation. Our law embodies no such folly. The rule is as I have stated it, and as I have proved by indisputable authority. The name of Sir Matthew Hale sanctions every doctrine which he promulges. Such the Court will instruct you, is the rule that must govern every Court of Justice in trials upon cases presenting the question whether or no the death proceeded from the violence suffered. So that the inquiry would be useless to the defence, even if they could establish that the surgical treatment of Mr. Davis was *not* the best possible. I admit the proposition asserting the *dangerous* nature of the trephine in his particular case; but I protest against the generalization of the principle.

Every remedy supposes an evil which an attempt is made to palliate or remove. And if a man should causelessly give physic to one in sound health, or trephine the skull of an individual when there was no external injury or internal disease, he would be doing a rash, foolish, and dangerous act. Any meddling with the human system by such an *ignoramus* would involve a danger, which I, for one, would not care to incur. But when a remedy is demanded or an operation called for by the condition of the patient to whom the physician or surgeon is summoned, he is ignorant or criminal if he neglects to administer the remedy or perform the operation. And in the present instance you cannot doubt that, had the care of Mr. Davis been entrusted to persons who have such a deadly horror of trephining, and nothing had been done to relieve the brain from pressure and irritation from the sharp *spicula* of bone, there would have been raised a cry which would have exceeded even the present in loudness, and in such a case the censure would be deservedly given; for though it would not excuse Mr. Darnes, the neglect of the surgeons to trephine Mr. Davis would have rendered them obvious to the blame which should everywhere attach to quacks and pretenders, who sport with the lives of men and aspire to the reputation and emoluments

of science and learning in their art, while they were ignorant of its first principles—and they would have been deservedly visited with the censure and indignation of the community. But they did what science dictated—what all the authorities in surgery recommended—what common sense itself required—and they have the respect and esteem of all whose respect and esteem is worth having. It is in evidence that they attempted first to use the elevator, without removing the bone by the trephine—this they were unable to do, and the only thing left was the trephine, which they proceeded to use, not as rash or imprudent men, not as empirics, nor yet with the fear of its exhibition, which characterizes some of their medical brethren, but with a well-founded trust in their skill, they proceeded to afford the sufferer the only chance for his life. Had Liston and Cooper both stood by Davis' bed side, and had they known the extent and character of the injury as fully as they were disclosed by the post mortem examination, they could have done nothing that Drs. Sykes, McMartin, and Beaumont left undone. They would have done, consistently with their own principles, precisely as these surgeons did; and, in spite of all, Mr. Davis must infallibly have died of the wounds he received at the hand of Darnes. The testimony on this, as on every other point, is clear and irrefragable. The facts are beyond the power of cavil or controversy. They do not permit you to doubt the existence of any circumstance, required to sustain the indictment. From the first design to the bloody termination of the affair, we have traced Darnes through a scene of ferocity and cruelty, which, I trust, has few parallels. You need no instructions as to your duty, nor exhortations to its performance. You are called by it to punish a man who has violated law in a most flagrant manner. The defense have enlarged upon the beauty and the expediency of mercy. Darnes deserves none. The law itself which he has violated has mercy in its penalties; but that is not the kind of mercy which the defense invoke. They call upon you to "stand between the criminal and justice." Your duty tells you to *fulfil the law, and administer justice,*

so that crime may be rebuked, and social security vindicated. The injury done to one person threatens the safety of many. The safety of society is inconsistent with the impunity of criminals; and to allow such offenses as the present to go without punishment would be the deadliest cruelty to the community, of which you are the guardians. I leave the case to you in the full assurance that a conscientious regard for duty will preside over your deliberations.

MR. GEYER FOR THE PRISONER.

November 12.

Mr. Geyer. Gentlemen of the Jury: During a professional experience of twenty-five years, I have had occasion to attend many trials, involving life or liberty. It has often been my lot in such cases, to be engaged as counsel for the accused; but on no occasion, within my recollection, have I witnessed a manifestation of interest equal to that which has been exhibited throughout this protracted trial, and is now so conspicuous in this thronged assembly. It is not, it cannot be, that on former occasions the community was not sufficiently impressed with the solemn importance of the inquiry or was indifferent to the fate of a fellow being, nor that those immediately concerned in the trial felt less the force of these obligations, or did not fully appreciate the nature of these duties. Whenever, in this country, one of our fellow-citizens—a worthy member of society—politically and morally our equal—enjoying the same inestimable rights and high privileges, is put upon his trial, on a charge affecting life, liberty or character, it is an occasion well calculated to excite a high degree of interest. In this case, however, the excitement so far exceeds any that I have ever before witnessed; it is so extraordinary in its extent and its nature, that we naturally inquire why it is so? It is not that the accused is the worthless being, he has been represented to be, or as the counsel for the prosecution would have us believe, “a common street loafer and a vagabond, a fit subject for the vagrant act.” No it cannot be. This

general concern is of itself a triumphant refutation of the calumny, and affords a significant admonition to his calumniators. It cannot be, either that this lively interest is occasioned altogether by the high character the accused has earned and maintained by his exemplary deportment, nor by the nature of the charge exhibited against him, or by any thing extraordinary in the punishment which would follow a conviction. Others, of equal respectability, have been arraigned on charges as grave and exposed to greater peril of punishment not less severe or ignominious, without any excitement approaching that which we have witnessed on this occasion. It is not the importance or the insignificance of Darnes, the gravity of the charge, or the severity of the penalty, nor any or all of these that occasions this general, this extraordinary solicitude, or has collected this vast assembly composed as it is, to a great extent, of those who have never before graced our courts by their attendance.

There are other considerations, which will account for the unusual throng, the deep concern in the issue, manifested here and elsewhere. It is, indeed, a trial of extraordinary importance, involving the most momentous questions, far exceeding in importance the mere conviction or acquittal of Darnes. Questions affecting the best interests of society, in which you and I, and every member of this community, present or absent, are as deeply concerned as the accused. You are now called upon to decide whether the people of this country are to be exposed to the arbitrary tyranny of the press—the defenseless victims of its relentless cruelty. Whether it is to be cherished and encouraged in its licentiousness, by denying to its victims all adequate redress, and punishing them as felons, if they attempt to redress themselves, and by accident or misfortune exceed the just measure of retribution. Whether we shall foster and protect in our midst, a vampire gnawing at the very vitals of social order and assailing with remorseless cruelty our most cherished possessions. Whether in this country a man may be struck to the dust, by merciless assaults upon his character and honor, or, wounded to the heart, through his

domestic relations, the cherished objects of his fondest affection, without a remedy; for over all these a licentious press asserts its usurped jurisdiction, and all are equally exposed to its blighting and withering influence, all equally unprotected. You will determine then, whether these are not injuries for which the law affords no redress, abuses against which it interposes no shield to protect us, wrongs which we must resent, or be dishonored and disgraced, dangers against which we not only may, but must protect ourselves.

In a case involving such momentous consequences, affecting the highest privileges and the most cherished interests of the community, of which we are members, it becomes us, who are immediately concerned in the trial, judge, jurors and counsel, to devote the entire energies of our minds to the discharge of the several duties devolving upon us. It demands of us untiring vigilance, a dispassionate, discriminating investigation of facts, a diligent examination and intelligent application of the principles of law, by which, not only this case must be determined, but the rights and duties of all, under like circumstances, satisfactorily ascertained. I am happy in the assurance afforded by your patient attention hitherto, that you will discharge your duty faithfully and impartially, that you will accord to me a patient and indulged hearing, while I endeavor to discharge mine: remembering that however anxious you may be to terminate your protracted and perplexing labors, that my obligations to my client are not less sacred than yours to your country, and must be as faithfully discharged.

It is sufficiently apparent that this prosecution was not commenced at the instigation, or prompted by the feelings or wishes of the surviving relatives of the deceased. *They* do not desire to victimize my client, they do not demand his punishment, as an atonement for the blood of their relative, involuntarily shed. Could they be heard, they would implore you not to sacrifice Darnes. They have hearts to sympathize with him in his misfortunes. They deplore, deeply deplore, the loss of their friend and relative, but they can and do appreciate the circumstances, by which my

client was surrounded, and the irresistible influences, by which he became the unfortunate and unwilling actor in the conflict, which resulted in the melancholy death of their friend. No, gentlemen, this prosecution has a different origin and other impelling motives. What they are, you, probably, have discovered; but I shall not now further inquire into them.

The gentlemen, who conduct the prosecution, profess to be entirely disinterested; to be actuated by no other motive than an ardent love of justice; to urge the conviction of Darnes, only to vindicate the violated majesty of the law; and declare their object to be the preservation of social order, and the protection of individual rights. We may allow all this—because it is not necessary to our case, to controvert their disinterestedness, or question their motives. We are independent of such considerations, resting our defense on grounds, more directly belonging to the case. We hope to show, conclusively, that the ends of justice will be best accomplished, social order most effectually preserved, and the rights of individuals best secured, by the acquittal of the accused.

But the prosecutors had an object in urging the disinterestedness of their motives and their extraordinary love of justice, upon your attention. I declare to you that before the subject was introduced by them, I had no suspicion whatever, of the existence of anything unusual in such cases, but I take leave now to say, that when I listened, as I did attentively, to the opening speech, and heard so little of the case, and so much about the motives, objects and feelings of the prosecutors; when I found that the gentlemen's disinterestedness and love of justice were made the chief and almost the only topics, which were regarded as worthy the consideration of the jury; I began to suspect that there was something to be concealed. I could imagine no other reason for undertaking an elaborate and earnest defense of motives, till then unquestioned. This, and the fierce denunciations of my client as a cruel and wanton murderer, without reference to a single fact to sustain the

charge, and in defiance of the finding of two grand juries, aroused by suspicions, which were to a great extent confirmed, by the intolerant spirit afterwards manifested toward the accused and his counsel.

During my long experience, I have frequently encountered prosecuting attorneys, as well as those hired for the occasion, as those acting officially under the authority of the State; and I have ever found the hired ones far more zealous, infinitely more anxious to produce conviction than the official prosecutor, less indulgent toward the accused, and less liberal toward his counsel. In cases, therefore, where I have to meet counsel other than the prosecutor, whether as auxiliaries or substitutes, as stipendiaries or volunteers, I expect that every obstacle will be interposed to prevent a successful defense, and every means resorted to that ingenuity can devise, or professional tact suggest, to insure conviction. I certainly, in this case, anticipated a vigorous and zealous prosecution; and was prepared to allow to these gentlemen, amateur prosecutors as they are, full credit for all the professional skill and ingenuity they should display, meeting and counteracting them as I best could, neither impeaching their disinterestedness nor questioning their motives. But I confess I become less charitably disposed when our honesty of purpose was assailed, and when appliances not only extraordinary but revolting were resorted to in the conduct of the prosecution.

From the tone and manner of the gentlemen, during the trial, it seemed evident to me, that they regarded themselves, if not quite infallible and omnipotent, at least as highly privileged, as possessed of all-sufficient authority to entitle them and their opinions to your exclusive consideration. When they moved, we were expected to stand aside, or at least bow in deferential silence. If we presumed to obstruct their operations, we were denounced in no measured terms, and accused of dishonest designs. It was, probably, one of the objects of the opening speech, and the lofty pretensions to disinterestedness, and love of justice with which it abounded, to forestall your opinions in their favor. The

subsequent denunciation of our motives was, probably, to exhibit a contrast so unfavorable to us, as to bring us into disrepute, and thus establish an influence for themselves and break the force of any argument we might urge in the defense. And, pray, who and what are the counsel for the accused, that they are thus to be scorned and set aside as unworthy your attention? I do not mean to inquire who or what are we, my colleagues and myself. I speak not of ourselves, but I inquire who and what are the counsel for a prisoner in any case? In what relation do they stand to the fair and impartial administration of justice? What are their claims to the consideration of the jury in the eye of the law and the constitution? The right of the accused to be heard by his counsel is regarded as so sacred, as to find a prominent place among the invaluable guarantees of the bill of rights. The counsel are the constitutional protectors of the rights of the prisoner, who not only may, but must be heard. We stand here then, not only under the protection of the constitution and charged with a sacred duty, but invested with high and holy privileges, for the benefit of the prisoner—which we are bound to assert and maintain, not for his sake only, but for the sake of all who may be placed under like circumstances. I need not add that whatever may be your estimation of us personally, as counsel for the accused we present ourselves to you, with as high claims to your favorable consideration of any arguments we may urge, as the prosecutor, under any circumstances, and upon authority less questionable, than that of *volunteers* in a prosecution.

It will be recollected, that on one occasion, I was accused by one of the counsel for the prosecution, with an attempt to perpetrate an offense highly dishonorable, and which, if I had attempted, would justly have been met by the scorn and contempt of all mankind. I allude to what occurred during the examination of Mr. Spurr, a witness for the prosecution. After proving that Mr. Davis sometimes wrote editorials himself, and occasionally examined others before they were put to press, we asked whether other persons did

not also occasionally write editorials. We thought this altogether pertinent, made so by the prosecutors themselves, by their examination; because if there were other editors, no acquaintance of Darnes with the office, would enable him to select the writer of the article then in question. For some reason which I could not at first comprehend, our interrogatory produced a sensation, a decided fluttering among the counsel,—one of them so far forgot himself, as to employ language, as unworthy of himself, I take leave to say, as offensive to me. He charged me directly with attempting a political manoeuvre—which, from the tone in which it was uttered, I understood to be a charge, that I intended to introduce into the trial the low and grovelling, but fiendish spirit of party. And so understanding it I would not altogether suppress my indignation. I can conceive of nothing more dangerous, nothing more criminal, than would be the corruption of the administration of justice, by the infusion of party spirit.

The gentlemen not only imputed to me the grossest wickedness, but the extremest folly. Ignorant as I am of the politics of any one of that jury, I should have been the greatest blockhead in nature, as well as the most corrupt of mankind, if I could have attempted what the gentleman is pleased to call a political manoeuvre. Though the faces of many of you were familiar to me, when you were empaneled, I knew the name of but one, and am to this moment, wholly uninformed, nor do I think it important to know, to what party any of you belong. The gentleman, I am persuaded, does not himself believe that I would have been fool enough under these circumstances, or dishonest enough under any, to attempt an act so disreputable as that he imputed to me. I can, therefore, only regard his expression as an evidence of the intolerant spirit, which distinguishes the prosecution, and which has pursued Darnes with unrelenting violence, not only from the time of the unfortunate encounter with Davis, but from the beginning of the controversy. I warned the gentleman, at the time, to be chary of his denunciations of counsel, and careful of

his allusions to the influences of party spirit in this case. This was construed into a threat; and I was told in tone of defiance, which I cannot forget, that he was not only willing but anxious, that everything connected with the case should come out: especially that all that had been said or done by him, might be given in evidence, with leave to us to make the most of it; he desiring no concealment, and fearing no disclosures.

The gentleman who addressed you yesterday on behalf of the prosecution, charged my colleagues with great and singular audacity in presuming for a moment to question the infallibility of the medical gentlemen, introduced on the part of the prosecution. In my apprehension, the gentleman himself presumed too much on the advantages of his position, as an amateur prosecutor, when he undertook to reprimand the counsel of the accused, for meeting a question forced upon them by the prosecution. For my own part, I inform the gentlemen, that I avoid no issue they have chosen to present—I shrink from no duty, however painful or unpleasant, especially when, as in this case, it is forced upon me; and above all, I never consult my adversaries, as to the course of a defense. I shall, therefore, not only incur the guilt of audacity, imputed to my colleagues, but I shall expose myself to the charge of still greater audacity in presuming to question the authority of some of the legal opinions of the prosecutors themselves.

Mr. Gantt, in his opening speech, made the extraordinary declaration, that on this case there had been attempts to control or forestall the administration of justice, out of doors—when, where, or by whom he did not inform us. I own I could not perceive its application or its pertinence to the issue, but it occurred to me, that if the gentlemen, either of them, knew of such attempts, it would have furnished an appropriate occasion for a display of their love of justice. In a country where we hold everything by law, where our dearest rights, our highest privileges, our most cherished interests depend so much upon the upright, pure and impartial administration of justice, every attempt to control or

forestall it should be promptly and severely punished. The temple of justice is our place of refuge, our defense against oppression, the only place where we find legal redress for any wrong—where our invaluable rights and holy privileges can be peaceably maintained. If then it be true that there has been in this case, any attempt to pollute this temple, to poison its pure atmosphere, by out-door influence, I demand to know where were these gentlemen's overflowing love of justice—their holy zeal for the supremacy of the law? Why did they not then step forth and vindicate their lofty claims, by bringing the offenders to justice? Must we conclude that all their zeal and love of order was dedicated to the public service in the prosecution of my client?

I had heard of the exertion of some out-door influences, and some attempts to forestall the administration of justice, in the prosecution of Darnes. I had heard that he was charged with and committed for murder, before any death ensued, and bail refused, though abundant security was offered;—that he suffered a long imprisonment, in direct violation of his constitutional rights—all in obedience to influences and to answer ends, other than of law or justice, and in defiance of both. I had heard that when he sought to avail himself of his constitutional privileges, as a freeman, and was brought before the county court, the press, that engine of great power for good or ill, by a publication, threatening the court in no equivocal terms, attempted to control its deliberations, and it may be, succeeded, for Darnes was denied the common right of every freeman. If this be true, here was a flagrant case of an attempt, at least, to control the administration of justice, challenging the interference of the gentlemen: a fit occasion too for the exertion of their patriotic desire to maintain the majesty of the law. But I must have been misinformed, surely such things could not happen, with impunity, in a country so favored as ours, while we have among us these gentlemen, watching over our peace, and patriotically devoting themselves to the preservation of the administration of justice uncontrolled, and the security of the rights of individuals.

And yet I cannot imagine to what else the gentleman could have alluded, in the declaration to which I have referred.

I have said, that I should controvert some of the legal opinions of the gentlemen, by which they intend this case shall be governed. I shall dispute the positions they have assumed in the conduct of this prosecution. I think I shall be sustained without reference to authority, in denying, that there can be a murder before there is a death, although the contrary has been held on the authority of one or both these gentlemen; for Darnes was formally accused of murder, and actually committed as a murderer, before it was ascertained that Davis was even likely to die of his wounds, much less dead. I deny that a murder could be committed in the heat of passion, as charged in this indictment, although it has been said even here, that Darnes was guilty of an outrageous murder, and this in defiance of the finding of two grand juries, upon the evidence of the State, uncontradicted and unexplained. I deny that the gentleman can put the accused upon his trial directly or indirectly, for murder, or that they are at liberty to urge upon the jury any matter inconsistent with the indictment; and I protest against the employment of epithets, which do not belong to the case, and can serve no better purpose than to show dissatisfaction with the grand jury. I contest the doctrine that a libelous publication in a newspaper will in no case justify or excuse the smallest battery. I shall do this not upon the authority of common or statute law, but by law of higher origin, and of more enduring nature, the law of your own hearts, written there by your Maker, in indelible characters—the instinct of self-defense and self-protection, if you please so to call it, a necessary and irrevocable law of nature, and I may show before I have done, that there are some libels, for which the scoundrel authors ought “to be lashed naked through the world.”

The gentlemen profess a high regard for the law, and declaim eloquently about the vindication of its violated majesty; but I discover that it is the English, not American law, that has won their affections—not even the common

law as modified in this country, by the nature of our institutions and public sentiment, as it must be administered in practice, *that* the gentlemen repudiate. It is the ancient common law in all its rigor, with all its barbarisms, that they invoke for the occasion. Every American citizen feels and knows, when the English law affecting the personal rights and duties of individuals, is read in his hearing, that there is and necessarily must be a wide difference between it and the law of this country; that the inexorable spirit of the English law cannot be allowed to control the administration of justice here; but all do not appreciate the cause of this difference so universally felt.

According to the theory of the British constitution, all sovereignty resides in the king, and is recognized as original and inherent, by divine right; the people are but subjects; formerly they were mere vassals—under the feudal system, little better than slaves. The people found masters in the barons, and they in turn were subject to the control of the great master of all, the king; all were in a state of servitude. They have, however, accomplished much; the feudal system is exploded—degrading personal servitude does not exist. The rights of the people have to a great extent been secured, but in a manner and upon principles harmonizing with the theory of their constitution.

In the memorable struggle, which resulted in extorting from a weak prince, the great charter of liberty as it is called, a great mistake was I think committed, in accepting as a grant from the crown, what belonged to the people, as an original divine right, and thereby recognizing the exclusive sovereignty of the crown, and failing to assert their own. Since then the people have secured to a great extent their personal liberty, by extorting concessions from the crown, and have imbibed much of the free spirit so much cherished in America. They are the freest people in Europe, but the degrading theory of their constitution remains—they are still *subjects*, not sovereigns.

Legislation and the administration of justice, in England, accommodate themselves, as they must in every country, to

the spirit of its political institutions. The common law, affecting the relations between sovereign and subject, or the rights and privileges of the people, had its origin in a comparatively dark period of its history, and is distinguished by its rigor and intolerance. The judges holding their appointments by the favor and at the pleasure of the crown, have a natural bias in that direction—separated from and placed above the people, they do not mingle with them, and know little or nothing, and care less about their sentiments or interests; they cannot and do not appreciate the circumstances or feelings which control the actions of men—they follow precedents, caring little or nothing for consequences. Many an Englishman has been sacrificed to an antiquated abstraction, his natural right of self-defense and self-protection is denied, in order to preserve the peace of his sovereign Lord the King.

In America we hold our several rights and privileges, by a different tenure—not derived from the grant of any superior human power, for we acknowledge none—they are original and inherent. We are all sovereigns not subjects. Here man rises to the stature designed by his Maker, and is under the most sacred obligations of duty, to maintain himself erect. All have rights, unalienable rights, and among them the right of self-protection and self-defense. The subject who derives his rights from an acknowledged master, accepts the grant subject to the limitations imposed, or the laws ordained by the same power. The freeman retains his original rights, which he has not voluntarily surrendered or forfeited. According to the spirit of our free institutions, the original inherent right of self-defense is not surrendered—every citizen of the republic is entitled to the protection of all others, but this does not impair or weaken, much less take away his right of self-protection. It is one of those unalienable rights, which no human power can give or take away. When society fails to afford adequate protection, we not only may, but are bound to protect ourselves. Happily, too, in this country, our judges, and especially our jurors, are not so far removed from the

people as not to understand or appreciate the force of public sentiment: themselves, a portion of the people, they by their habits of life, and their associations, acquire a knowledge of man as he is—can enter into his feelings and judge of his actions, according to the circumstances by which he is surrounded.

It is true that the common law of England has been introduced, as a part of the law of this state, but we have adopted only so much of it as is not inconsistent with pre-existing law, and I add that no part of it inconsistent with the nature and spirit of our institutions, ever has been or ever can be in force in this country. In other states, where the common law has been introduced as in this, in general terms, it is held to be modified by, and must accommodate itself to our condition, and the circumstances of our people. The spirit of the common law cannot be infused into our system, except so far as it harmonizes with the spirit of our institutions. You may ingraft the common law by statute, but all its branches, uncongenial with the spirit of our system, will wither and decay; those branches especially, which would impair our inherent rights, cannot flourish in the pure atmosphere of America. Any law from whatever source it emanates, which is against a public-sentiment, breathing the spirit of our institutions, can never be enforced.

Having now presented some of the reasons why, in my opinion, the English common law cannot be, and ought not to be enforced in this country, so far as it might limit or control the inherent right of the citizen, I proceed to give you a few examples, which need only be stated, to satisfy your minds how utterly indefensible it is to insist, that we are to receive everything as binding authority which we find in the common law of England.

That law recognizes no justifiable homicide, except when committed in the prevention of a forcible and atrocious crime, or by an officer of the crown, in the execution of his duty. Homicide, in self-defense, is not and never was justifiable by the English law, though committed under

circumstances of the most urgent necessity, in defense of life—though it is not a felony, it is still a crime, deserving, the books say, some punishment, and was punished with the forfeiture of the goods and chattels of the delinquent, from which he could only escape by a pardon, until the reign of George IV., when this odious practice was abolished. Before that period, the judges did occasionally take the liberty to direct a general verdict of acquittal, not because the law authorized it, but because of the plenitude of their power. When the judges did not choose to interfere, the *delinquent* must submit to the punishment, if not relieved by an appeal to the tender mercy of the crown. This barbarism, however, continued to be a part of the English law, until the reign of George IV., who, I say it to his credit, imbibed something of the spirit of the age. He was somewhat of a jolly king. Before his accession to the throne, he had mingled much with the people, and by his associations, he had been taught, to some extent, to appreciate them, and perhaps he learned, among other things, that his princely head was no harder than the heads of others, or entitled to more respect. But to whatever cause it may be attributed, in his reign the criminal code received several improvements, and among them, forfeiture, in the case I have mentioned, was abolished. Now, I inquire, is this branch of the common law, congenial with the spirit of our institutions—could it ever have been enforced as law in America? No! your own hearts will answer no! And yet it is common law, akin to that which the gentlemen rely upon in this case, of the same origin and of equal authority.

Again, by the same law, homicide is not even excusable, unless the slayer first does all in his power to avoid the assailant and retreats as far as he can; though his life be assailed, he must back to the wall, before he strikes in self-defense; if he strikes before he is absolutely driven to extremity, and can retreat no further, his offense is aggravated to felony, murder, or manslaughter, if death ensue. Sir Wm. Blackstone, whose work, I admit, is an admirable commentary on the English law, wrote with his eye to the

bench, and had a high regard for the prerogatives of the crown, and the theory of the English constitution, says that the subject must fight unto death in defense of his *sovereign's* honor; he must stand up to the conflict, and kill at every hazard; he must not retreat, on pain of death: but he may not strike in defense of his *own*—not even in defense of his own life—then he *must retreat*—he must back to the wall before he asserts his natural right of self-defense, or be punished as a felon—and even if he does so far dishonor his nature, as to back to the wall, he can only save his life, by an act, which forfeits his goods to the crown. This is common law, the majesty of which these gentlemen are so zealous in maintaining. Possibly, unless modified by statute, it might be declared to be law here by the bench; but I hazard nothing in saying that you would not regard it as such, though it should be so declared by forty judges. It is so repugnant to all our ideas of the right of self-defense and self-protection, that it never can be enforced in this country, where juries, as you have been told by the prosecutors, are the judges of the law and the fact in criminal cases, and are responsible to the public opinion, as well as to their own consciences. I stop not to inquire how far this principle of the criminal law has been modified by statute. It is not, never was, and never can be, while our institutions are upheld, the law of this state. The right of self-defense existed before the introduction of the common law, and is as perfect now, independent of any statute, as before the common law had any existence here, and will exist, even in spite of a statute to the contrary. We have, indeed, improved much upon the common law, especially in criminal cases by legislative enactments, but more by the agency of juries, in the practical administration of justice. We shall, I hope, continue to improve it, until we have reformed all its barbarisms. The inherent right of self-defense has always been correctly understood in this country, and has been upheld in practice.

It has been often decided substantially in criminal trials, that he that slays an assailant in defense of his life, is

justifiable and is entitled to a full acquittal, without an appeal to the interposition of a court, or the tender mercies of an executive—as a matter of right, not of grace or favor. It is the established law, and has ever been in the Western States, especially, that when a man's life is assailed, he is not compelled to retreat to the wall, or give back a single inch—he may stand in his tracks against all comers—he may employ all the means within his reach, and slay his assailant. This is what the gentlemen please to denominate “ferocious and abominable doctrine.” It has, nevertheless, been recognized by juries in innumerable cases, and is approved by the sanction of every American heart. Who shall tell an American citizen, stand here or go there? Is there a man in this vast crowd, who, if he were attacked, would flee to the wall, or hesitate to strike down his assailant in his tracks? If there be one, he is a craven and a caitiff, unfit to breathe the pure atmosphere of Missouri, and ought to leave it immediately. We desire to harbor none such here.

One of my colleagues, (Mr. Allen,) was favored with a somewhat harsh reprimand, from the gentleman who preceded me, (Mr. Gantt,) for an expression of an opinion on the right of self-defense, which, it was said, was ferocious and abominable, and astonished him, (Mr. Gantt,) as Mr. Allen is a member of the church. Now, sir, waving the question of the propriety, of that gentleman's allusion to Mr. Allen's connection with the church, I cannot admit that the fact either changes the law or weakens the force of an argument; and I have yet to learn, that the rights or duties of a counsel are changed, or the respect due to him lessened, by the fact that he is a member of a Christian church. The sentiments of Mr. Allen are before the jury, and will be regarded or not, according to the force of the authority and the argument by which they are sustained, whether he be a member of a church or not. Mr. Gantt owed it to himself and his cause, to pass them by, or oppose them by authority or by argument, not by epithets, which are neither the one nor the other.

The doctrine, which so much offended Mr. Gantt's sense of

propriety and love of order, is, that if one man attempt to chastise another, by cow-hiding him, the assailed party may defend himself without running, and if, in so doing, he slay the assailant, it is excusable, if not justifiable homicide. This doctrine I am prepared to maintain, however ferocious and abominable it may seem to the gentlemen, or rather however much they may desire for the occasion to make appear so. It is the American doctrine, and has often been sustained, especially in the Western States. It was recently upheld in Kentucky, by an argument more able and eloquent, and more powerful than anything I can urge, and in a speech, a part of which has been read in your hearing, and what is of more importance, sanctioned by a jury. Our brethren of the North, the Yankees, have been referred to more than once by the gentleman, as a cool, dispassionate, and law-abiding people; and I remember a case which occurred in that *cold* country, the result of which shows that public opinion, and the law of self-defense, even among the Yankees, is very much as it is in Kentucky. The law we insist upon is the law of Boston.—Mr. Austin attempted to cane Mr. Selfridge, in one of the streets of that city; Selfridge sought no wall, but shot down his assailant; he was indicted and put upon his trial; there was great solicitude about the result—the common law of England in force in Massachusetts condemned him—public opinion justified him—and there was no small anxiety to know what a Yankee judge and a Yankee jury would do. The judge met the question as became him; he presented the English law, but so diluted in the charge, as almost to insure an acquittal, and a Boston jury unhesitatingly found a verdict of not guilty.²³ It is not true, therefore, even among the Yankees that a man must stand and take a flogging, or flee to the wall. It is a slander to say so, the sanctity of the person is as much regarded in New England as here. Gentlemen may talk of a man's being cool under such circumstances. Perhaps a man inhabiting the icy region, about the North pole, might be cool. Men do not

²³ See 2 Am. St. Tr. (p. 544).

calculate or consult Blackstone at such times; certainly, none of the inhabitants of the torrid or temperate zones. If there are any such, they are entitled to very little or no regard; he, who would coolly stand and calculate, or run when his person is assailed must be either more or less than a man.

It seems to me that the prosecutors in their ardent zeal for the preservation of order, or their desire to insure conviction, have altogether overlooked the spirit of our institutions and the sentiments of our people, important considerations in the administration of criminal justice. They mistake the people of Missouri, if they imagine that their unmeasured denunciations of the right of self-defense, as it is understood and practically upheld in the Western States, will be acceptable to them. They have neither of them been long among us, and that may perhaps account for their mistake. From my long residence among this people, long enough to be among the oldest American settlers, I may be allowed to say that I know them well. I am familiar with the prevailing sentiment on these subjects, to which the pursuit of my profession has particularly directed my attention. I know that the people of this state will not receive with favor, the doctrines which appear in this case to have won the affection of the prosecutors, they cannot consistently allow them to be reduced to practice in any case. Let the gentlemen go among the people, read to them the common law, on the subject of self-defense, according to Blackstone or any other author, ask them whether that is the law by which they are or can be governed, and my word for it, they will almost unanimously reply in the negative with indignant scorn. Go to the frontier, among our hardy pioneers, the moccasin boys, as they are called, tell one of them, in presence of his sons, that there is a law in Missouri, imported from England, by which, if a man is assailed, he must run to a wall, or some impassible obstacle, before he resists; he will exclaim "boys, do you hear that?" and his hand will be instantly on the cock of his rifle. Our frontier men, unlettered as many of them are, understand

the rights of their fellows and their own—they feel and cherish the free spirit of our noble institutions, and are prompt to discharge the high obligations they owe to themselves, their families and their countrymen.

If a man does another the greatest possible injury which can be committed, strikes him to the heart through his domestic relations, and the indignant husband or father, obeying the impulses of his nature, attempts to redress his own wrongs, and the offender is slain, although there be no intent to kill, it is murder by the common law, unless the mortal blow be given while the offender is in the very act of perpetrating the injury, or so soon thereafter as not to allow sufficient time for passion to cool. And even then the homicide is neither justifiable nor excusable. Not justifiable because not committed in the execution of an *official duty*, nor in the *prevention* of a *forcible* and *atrocious* crime. Though the offense of the slain is *atrocious* in the sight of God and man, it is venal, not criminal, in the eye of the common law, and may be atoned for in money. The injured party has no redress, but in a civil action, no balm for his wounded spirit but damages. It is not even *excusable*—because the slayer's life was not in danger—though he has been robbed of that which every honorable man cherishes as an infinitely more valuable possession, his honor and his domestic happiness. Such is the law of England, the common law. Is it, can it ever be the law of America? I am sure I need not add a word of argument to prove that you ought not to recognize this or any other branch of the common law, akin to it. I do not say that the injured party *ought* to kill. But I do say, that if he should scourge the miscreant murderer of his peace, wherever he should find him, in cold or hot blood, and death should ensue, no jury of our countrymen could be found, who would consign him to the gallows or the penitentiary as a felon. You, in such a case, I doubt not, would rise in your places and pronounce at once, a verdict of acquittal,—and that verdict would be received with acclamation in a country where there is so

much sympathy for the unfortunate, and so just an estimate of the rights of man.

Instances might be multiplied to show that the spirit of that portion of the English common law under consideration, is uncongenial to the nature of our institutions, and repugnant to the free spirit of our people, and therefore cannot be infused into the administration of public justice here. But the examples I have presented will suffice to show, that however much the decisions of the English judges are made to harmonize with the theory of their institutions, they are in the particulars at least to which I have referred, wholly inapplicable to our condition. The common law is here modified by the spirit of our institutions, and every thing repugnant to it is a dead letter.

I now proceed to consider a subject more directly connected with the facts of the case, though not more pertinent to the principles involved—I mean the abuses of the press. I intend not to indulge in general denunciations nor have it understood that my remarks apply to all engaged in the conduct of the press. Nor do I regard it as a part of my duty, to designate what particular conductors of the press are within or without the scope of the remarks I shall make on its licentiousness—others will make the discrimination. I take leave, however, to say, that these remarks are not made through any fear of exposing myself to animadversions, of the kind indulged in upon the remarks of one of my colleagues. The editors in St. Louis will, I hope, do me the justice to believe, that I am not very apt to falter, to startle at small matters, or waver in the discharge of my duty, in fear of a newspaper paragraph. I have stood such things many times, and do not expect to escape annoyance hereafter. Nor do I stand here to redress my own grievances; but to discharge a high duty, and I intend to discharge it, at least, without regard to any selfish consideration, though I may not in other respects be equal to the occasion.

To animadvert on the conduct of the press is, in this country, I know, a delicate and somewhat dangerous un-

dertaking. Editors are aware of the high estimate in which the liberty of the press is held by our people, and are, I think, sometimes disposed to use their power in exciting unnecessary alarms, and create a belief that the liberty of the press is in danger, when only its abuses are rebuked; and it must be owned that they have a potency, which is not to be treated lightly. I have as high a regard for the liberty of the press as any man; it is in this country so sacred that it is protected from invasion by the constitution. The press is the sentinel of public liberty, and when conducted upon principles, and by men worthy of its high calling and holy privileges, is among the most valuable of our possessions, as freemen. Its freedom is almost, though not quite as valuable as the impartial administration of justice or the trial by jury—liberty, political and personal, would not long survive the loss of either;—but under the control of the unworthy, of whom there are but too many among its conductors, the press is as potent of mischief as otherwise it is of good—nothing is too sacred for its invasion, nothing firm enough to withstand its power. If its degradation should become general, its pernicious influence could not be resisted, it would corrupt public morals, destroy the peace of families, break up the elements of society, and shake to its foundation, if it did not overthrow our free institutions. The licentiousness of the press should, therefore, be restrained; but for obvious considerations, legislative interference is dangerous. The moment you attempt to restrain it by legislation, there is danger of an infraction of the constitution—none can tell at what point it would stop. It is impossible to anticipate what considerations would influence a legislature, in fixing the boundary between licentiousness and liberty; any line of demarkation would necessarily be arbitrary. It is, therefore, better that the press should not be shackled by law, and so our legislature has decided, and I think, wisely—leaving its licentiousness to the rebuke of public opinion, and the redress of private grievances to the injured party.

It is said that no man is excusable who attempts to re-

dress his wrongs otherwise than by an appeal to law, which it is said furnishes an adequate remedy. This, if it was true, would subserve the interest of the profession, and I ought not to object to it, but unfortunately it is a mistake. Blackstone, whose work is intended as an eulogy as well as commentary on the English law, does indeed say, as an evidence of the perfection of the common law, that "there is no wrong without a remedy." Yet he is constrained in a subsequent part of the same work to admit that there are injuries for which the law affords no redress, and these he calls "*damna absque injuria*." He eulogizes the law where he can without a blush, and covers its blemishes with a scrap of Latin. Gentlemen just from their study of Blackstone, before they have acquired a practical knowledge of things as they are, may be deeply impressed with that confessedly able commentator's ideas of the perfections of the common law, and others from policy may pretend to believe that there is no wrong without adequate legal remedy; but those who profit by observation and experience, know that there are many wrongs for which the law affords no remedy; many more and greivous ones, for which the redress afforded is not only inadequate, but disgraceful and contemptable, and therefore no remedy at all. A newspaper libel, and the atrocious injuries I have alluded to and need not further describe, are among them. In these last the remedy is only by civil action, and that not for the real injury, but a fictitious one—fiction being one of the expedients of the English judges, to get over the imperfections of the common law.

The gentlemen admit that a newspaper libel is a great, a serious injury, but the law gives an indictment for the libel, and an action for defamation. And the injured party must prosecute or sue at the law, and content himself with the result as full satisfaction. Let us suppose a case—one not difficult to imagine—and consider what would be the value of the remedy in practice. An editor, a hired one it may be, without character, reputation or responsibility of any kind, publishes a slander on the character of yourself, your

wife or your daughter—a slander of most vindictive character, which if true would make you bow your head in shame, and forsake the haunts of men. Happily there are as yet but few instances of such deep degradation of the press; but there are and have been enough elsewhere, to show that it is probable they may occur here. In such case of what value would a verdict and judgment be to you? What punishment to the guilty libeler? He might laugh at your suffering and scorn your power. In all probability he would renew the assault with increased virulence.

Let it not be said, that the slanders of the worthless editor I have described, could not injure any one. It ought to be so, certainly; but it is not. There may be a few, a very few, who, by their education, a high and well-earned reputation, extensively known, and universally acknowledged, may be above the reach of a libelous editor, but by most of us a newspaper slander is not to be contemned; it spreads far and wide, beyond the limited circle in which the infamy of the slanderer, or the honest fame of his victim is known or appreciated. It acquires force from the use of the plural “we.” It often happens that an editorial receives credit and currency, which would be utterly disregarded, if the writer had employed the singular pronoun, “I,” or subscribed his name. When the plural is used, neither the writer, nor his character, is present to the mind of the reader; but in the other case both are before him, the writer’s character for veracity, and claims to respectability, will to some extent at least, affect the credit of the article. If the author be infamous, it renders his assault comparatively harmless, but not altogether, for unhappily the appetite for personalities, for abuse of private character, is too general. With too many a libel on their neighbor is a delicious morsel, if it be racy; they care little about its truth or falsehood. These and other obvious considerations give to a newspaper libeler a power to inflict the most grievous injuries.

We have no protection by law against the abuses of the press. A prosecution for a libel gives it a wider circula-

tion, and its author notoriety, an object with him, because it is the nearest approach to fame he can hope for. He and kindred spirits combine to excite alarm for the liberty of the press—the cry of persecution is raised—too often successfully, and the libeler receives the honors of martyrdom, in the shape of increased patronage. A civil action is, as I have stated, equally valueless, to the assailed, and almost equally profitable to the assailant; but both the prosecution and the action are worse than no remedy. If you sue or prosecute a worthless, remorseless, and irresponsible libeler, he will employ a blackguard, if possible greater than himself, to defend him. The whole of your past life is exposed to searching scrutiny, and few there are so immaculate that some blemish may not be found, to afford an apology for a calumny; witnesses, at least, may be found, who can be brought to testify to opinions of character from hearsay. You are made to endure, and the jury are compelled to listen to a systematic attempt to find flaws in your character, and tear it to pieces, in mitigation of damages or punishment.

Tell us not then of an action or prosecution against such an editor, as an adequate remedy, or as any remedy at all. If you recover damages, or a fine is assessed—what avails it? It is but an appeal to his *pocket*, and that in all probability is as empty as he is destitute of feeling and of principle. Punish him by imprisonment, and he becomes a martyr and you a persecutor. A man such as I have described is but an animal, and should be made to feel, where alone he can feel, for the outrages he perpetrates against the decencies of life. He deserves the rod, and the rod he ought to have. Even if the writer and publisher of an atrocious libel, be responsible and comparatively of respectable character, it only aggravates the injury by increasing the force of his attack; but the remedy, which the law affords, is not for that reason adequate—it is not a redress for the wrong. He will come out of a successful prosecution with all the advantages I have named; he will rally about him many who would otherwise care little or

nothing about him. With increased popularity his power of mischief would be augmented. If you commence a civil action, he might not, as in the other case mentioned, resort to new assaults on your character, in the conduct of his defense; but he would make appeals, which are often effectual in mitigation of damages.

He would have the jury told, that the man who would be content to seek or accept money, in satisfaction for an injury to his character, is unworthy of favorable consideration; it would be directly charged or at least, insinuated, that whatever damages may be given, the counsel will divide the spoils, and this is often true. You may succeed and recover damages, reduced by the means I have named, and other appliances; and you would be scoffed at, and told that it was the standard of the estimation in which your character is held, and money was what you wanted. But great or small, it is all the satisfaction the law affords—you get money, (little or much,) the common law panacea for every ill. It will not, however, heal the wounds inflicted by a licentious press. Bank notes cannot extract the poison, or soothe the pain, however thickly applied.

Since the law does not protect us against the abuses of the press, and affords us no remedy for the wrongs it commits, to what shall we resort for protection or redress? The law cannot shield us, or give us adequate protection, without danger of invading the liberty of the press. Legislation on that subject I deprecate as a great evil, because of the consequences to which it would lead. It would be better for the security of public liberty, for the character of the press and editors themselves, and more effectual for the preservation of social order, that all the profligate and licentious editors in the United States, should be decimated, and flogged once a week throughout the year, than that the liberty of the press should be invaded by law, and its freedom shackled by penal enactments. Public opinion may be potent enough to restrain its licentiousness; but the power of public opinion cannot be brought to bear upon a party press, in a time of high party excitement, if ever, for its

assaults on private individuals. Libelous publications will not diminish the patronage of the publisher. The only mode in which public opinion does or can act effectually, is in protecting those who protect themselves: in justifying their fellow citizen, who, otherwise remediless, redresses his own wrongs, by inflicting the chastisement which the libeler so abundantly merits. Let it be understood that where the castigation inflicted does not exceed the atrocity of the libel, there shall be impunity; and it will be a wholesome admonition to the conductors of the press and improve the morals of some of them. There is no danger that it would be followed by any serious disturbance of public peace. A few examples would settle the law, and insure quiet by purifying the press, by reformation or expulsion of the unworthy from the editorial corps. On the other hand it would be a license for new atrocities, to punish for an act, which public opinion enjoins as a duty. It would not preserve the public peace;—because, when the press transcends its duties, prostitutes its character, and assails the reputation of a private citizen, or that of his wife or daughter, it is not in the nature of a freeman, it belongs not to his character, to submit to it; deprived as he is of all other protection, he will protect himself and those dearer to him than self—denied all adequate redress, he will right his own wrongs; public opinion sanctions, nay, compels the act, and no law can prevent it.

It is an established maxim, I know, of the English common law, that ‘words will not justify a battery’—whether they are written, printed, or spoken, no matter how grievous, or atrocious the slander, and this accords well with some other branches of the same *law* to which I have referred. It harmonizes well with that barbarous system, which regards the subject as a mere animal, and exhausts its energies in the protection of his body, affording no adequate protection or defence for his character, which it seems to regard as a comparatively worthless possession; injuries to which may be atoned for in money. A law, which forbids a man to strike in defence of his life, unless he first retreats to a

wall, and cannot escape, is in keeping with that which does not allow him to raise his hand in defence of his character, though to forbear is ignominy and disgrace. But such laws, I repeat it, cannot be in force here, they are forbidden by the genius of our institutions, and the spirit of our people. I concur most heartily in the sentiments of Judge Rowan, read in your hearing by one of my colleagues. You will recognize the distinction he has made. Man is indeed something more than a mere animal. He possesses higher qualities and nobler attributes—he has possessions more valuable than life; he derives them from a source (and may defend and protect them by authority,) higher than legislative enactments. It has been said, that the Americans, especially in the West, are prodigal of life. I do not know the fact to be so, and do not admit it; but if it is true, in comparison with the people beyond the Atlantic, it must be because man in this country has possessions infinitely more valuable, and asserts his right to defend them at the peril of life. He is not borne down by the tyranny of a king, or by the institutions of a monarchy. He feels that he has in his nature, that which renders him the equal of any sovereign. He knows that if he preserves an untarnished fame, there is nothing in the institutions which he cherishes, that will prevent him from rising by his own energies to the highest political honors. Though born in poverty and reared in obscurity he may attain the level of the highest, and earn for himself distinction and renown. He knows how to value his possessions and to estimate his privileges. He knows that it is right and feels it to be his duty, to defend the man *within* as well as the shell *without*. In England you perceive, and it is so in all monarchies, it is the animal alone, that is entitled to the protection of the law, or the right of self-defence. The subject has no natural rights; his energies are kept down by the tyranny of the institutions, and laws not less unfavorable to his advancement. If he is born in poverty, he lives in obscurity, and dies unknown. It is the policy of those who govern by divine right, to keep

down in the mass, by the machinery of the criminal law, that spirit which would vindicate their rights as men.

There is a maxim of law, of universal application, because it is founded on right reason, that "when the reason of a law ceases, the law itself ceases;" by which is meant, that a rule of however long standing, which cannot stand the test of reason, in its practical application, is not law. Hence we find courts frequently overruling, what was before regarded as law, and establishing a new rule, or a modification of an old one, not by virtue of any power to change the law, but in discharge of their duty to declare what it is, as ascertained by enlightened reason. Within our own times, the common law has received many improvements, by this process, both in England and America. Another and a cardinal principle, in the administration of justice, is, that no rule of the common law is of binding authority, which is not in harmony with the letter or spirit of the institutions of the country. And these considerations are to be regarded by juries as well as by courts, in settling the rules, by which a given case is to be governed.

I now proceed to state to you the propositions of law applicable to the case, and which I think I have established. I have examined them with deliberation and submit them to you with a full sense of the responsibility of asserting them in my place. I contend that a newspaper libel, in this country, justifies a battery. This, I think, results from the inherent right of self-defence; from the duty of every man, to protect himself against all aggression, against which the law does not protect him. It cannot be just or lawful in any community to punish that which it commands, and which nine-tenths of its members would do under like circumstances. The reason for punishing a battery, in such a case, does not exist here, and therefore the English law, on that subject, is not in force. In our still imperfect emancipation from the thralldom of English precedents, the court may regard it as its duty, to tell you that the rule of the common law on this subject is in force; but, from the considerations I have mentioned, you cannot so consider it; for

it is as repugnant to the sentiments of your hearts, as it must be to the conviction of your judgments. I do not say, that the injured party may kill the libeler; on the contrary, if the assault be with intent to kill or maim, and death ensue, it will be murder, or manslaughter, according to the attendant circumstances; but I do say, that he may, and in some cases *must* chastise the offender. This is recognized to some extent by the English law of libel; indirectly it is true, but still it is recognized. The reason on which the punishment of the libeler rests, is to forestall the exercise of the right of the injured party to redress his own wrong. The libel is punished, not for the injury to society, through one of its members, nor for the wrong done to character, (that seems to be little regarded:) it is to preserve the king's peace, the object of supreme solicitude. The libeler is punished to furnish an apology for the punishment also of the injured party, if he should do what is anticipated in the premises. What is this but a substantial admission that a battery is the natural consequence of a libel, and would be lawful also, but for that policy which makes the preservation of the king's peace, the paramount consideration? What is it but an admission that when the law does not punish, the aggrieved party is expected to do it by castigating the offender?

My second proposition is, that homicide is excusable, when committed in a bona fide attempt to chastise the libeler, without a design to kill, or maim, in a case of sudden combat, where no dangerous weapon is used, and no undue advantage taken. This proposition I am prepared to maintain upon principle and by the letter and spirit of our statutes.

It is certainly desirable that men should have no controversies, or that they should settle them peaceably, and especially that melancholy results, such as that which occasions this trial, should be avoided; but man is not as he should be—he must change his nature and society must be reorganized, or more efficient protection must be provided, for the characters of our people as well as their persons, before we

can expect it. In the meantime, man must be regarded as he is; law and its administration must conform to his actual condition—he must not be sacrificed for the sake of abstractions, for acts to which he is compelled by the realities, by which he is surrounded. Erring men, as we are, we may not, must not, erect an ideal standard of perfection, or calculate the degree of christian forbearance attainable by man, and punish as felons those who do not come up to it, while we fall so far short ourselves. Sitting in judgment upon a fellow being, it does not become us to put the harshest possible construction upon his acts. On the contrary, it is our duty to regard him and his actions in a spirit of enlightened benevolence, and excuse him where we can, making due allowance for the frailties of his nature, and the circumstances by which he is surrounded.

The Legislature of Missouri has done much toward a reform in the criminal code, and the improvement of the administration of criminal justice, by the classification and definition of offences and the mitigation of punishments, by infusing into the system, to a great extent, the spirit of our free institutions. This is perceptible, in reference to that class of offences, denominated offences against the persons of individuals, perhaps more than on any other. The offence of murder is divided into two degrees, only one of them capital, and that of the most atrocious description. Many cases of murder, according to common law, are reduced to manslaughter, which is again divided into four degrees, according to the circumstances. That which would only be excusable homicide, punished with forfeiture of goods by the common law, is justifiable here. Many cases, which would be manslaughter in England are excusable homicide. And, in a case of excusable as well as justifiable homicide, the accused is entitled to a full acquittal as a matter of right, without the intervention of the clemency of the court; he incurs no forfeiture and needs no appeal to the executive. It is thus that our legislature, in obedience to the voice of freemen, has made the statute law conform, to a great ex-

tent, to the condition and circumstances of our people, reforming many of the barbarisms of that bloody code, to which the prosecutors appeal, and seek to infuse its spirit into the administration of justice here—that spirit you will perceive is as uncongenial to the spirit of our statute law as it is to the spirit of our people, who are here the masters of the law-makers. In this country legislation is subordinate to and must follow, it can neither lead, nor control or fashion public opinion; but it often follows at too great a distance, and I think has not yet accomplished all that the public interest requires, and public opinion demands, in the reformation of the criminal code, though the advance has been great. It is difficult to frame a general rule applicable to all cases, and not less so to anticipate them and provide for each one specially; and, therefore, it is, perhaps, best to correct evils as they arise. In the meantime, care has been taken that as little mischief as possible may be done, by the omission, by affording to the accused the full benefit of the trial by jury, in the spirit of the constitution. That valuable institution is no longer a matter of form, since it is freed from the influence of the bench. In England the judge sums up the evidence, in fact makes an argument, according to his *view* of the case, on the law and the facts; and thus exerts an influence, often pernicious. It is not so here; the jury decide the fact for themselves; the judge may instruct them on questions of law, but he must do it in writing so that the accused may have the benefit of an appeal to a higher tribunal. In this you perceive that the spirit of our legislature accords with our system of government, while it punishes the guilty, it guards the innocent, and throws around them the protection of the law, administered in a spirit of benevolence by his peers, uncontrolled and uncontrollable by any human power.

I will now direct your attention to the particular provisions of our statute applicable to the case under consideration. It may be proper, however, first to observe, that unless the facts proved correspond with those charged, there can be no con-

viction, and consequently those clauses only in which the description of the offence accords with the facts charged in the indictment, need be considered. That as this indictment is for manslaughter in the third degree, you cannot convict the accused of a higher, though you may of inferior, degree. You must either convict of the third or fourth degree, or acquit. Section 13 under which this indictment is framed, declares that

"the killing of another in the heat of passion, without a design to effect death, by a *dangerous* weapon, in any case except such wherein the killing of another is justifiable or excusable, shall be deemed manslaughter in the *third* degree."

By the nineteenth section it is enacted, that "the involuntary killing of another by a weapon, or by means neither cruel nor unusual, in the heat of passion, in any case other than justifiable homicide, shall be deemed manslaughter in the *fourth* degree." These are the only two sections in which the facts, in the definition, correspond with those alleged in the indictment. And the only essential difference between the two sections consists in a single word. The words "without a design to effect death," in the thirteenth, I take to be equivalent to the word "involuntary" in the nineteenth section, the difference in the phraseology is more in sound than sense, and was adopted probably to avoid tautology. The essential difference consists in the word "dangerous" in the description of the weapon. If, therefore, it shall appear that the cane used by Darnes was not a dangerous weapon in the sense here intended, he cannot be convicted in the third degree, and must either be convicted in the fourth, or acquitted altogether. For, it will hardly be contended that, because excusable homicide is not mentioned in the exception of the nineteenth section, he cannot be acquitted, unless the homicide is *justifiable*. The law declares in general terms, that in case of excusable homicide, he shall be acquitted.

The second subdivision of section 5, article 2, declares that, "Homicide shall be deemed excusable, when committed by accident or misfortune, in the heat of passion, *upon sudden and sufficient provocation*, or, *upon sudden combat with-*

out any undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel and unusual manner." Here you find that the difference between manslaughter in the fourth degree according to the 19th section—and excusable homicide, consists in the existence or non-existence of a simple fact. An "involuntary killing" is, I take it, a homicide committed by accident or misfortune; and no more—in both cases there must be *heat of passion*; the weapon must not be *dangerous*, or the manner cruel or unusual. But that which would otherwise be manslaughter in the fourth degree, becomes excusable homicide, if there exists any one of two other facts—either that the *heat of passion* was "upon sudden and sufficient provocation," or the killing "in sudden combat, without any undue advantage taken." I say sudden and sufficient provocation, for the heat of passion, because it cannot be intended to refer the sufficiency to the killing, which would be introducing a new and undefinable species of justifiable homicide, repugnant to our own notions of law,—the interpretation which I put upon the phrase, harmonizes with the other parts of the clause and the general provisions of law.

My views of the law are now before you. I have chosen to submit them, in this part of the argument, in a connected form; partly for my own convenience, to prevent the necessity of repetition hereafter; but chiefly to afford you, in advance, all the aid in my power in settling the questions involved. You are to determine in your own minds and settle for yourselves the principles of law, by which this case is to be governed. When you have done so, to your own satisfaction, carry them with you in the further investigation of this case, and apply them to the facts as they are presented. This is a high and responsible duty, and demands your most anxious consideration. You are, as you have been told by the prosecutors, the judges of the law and the fact. Though the charge of the judge on a question of law is entitled to your respectful consideration, and the arguments of counsel, to your patient attention;—upon you alone de-

volves the responsibility of the decision. You are to examine the facts impartially—consider well, and in a spirit of benevolence, the circumstances by which the accused was surrounded, and administer the law in mercy.

You have, indeed, been told by the prosecutors, that you are to allow no consideration of mercy to influence you. That, they say, belongs exclusively to the executive. It is true, that you have not the power to pardon—that is vested in a governor. The proposition was, however, urged upon you in a different sense. They call upon you to smother every generous and manly sentiment in your bosoms, and to administer only the rigors of the law, without compunction, and without mercy. This is at war with the benign spirit of our criminal law; it is directly opposed to the rule familiar almost to all, which commands a jury, in a criminal case, to resolve every doubt in favor of the accused. It is opposed by the feelings and sentiments of every one who understands the value of life, liberty, or character, and the design of criminal punishment. It accords illy with the doctrine, held by Baron Smith in a charge to a jury in a duelling case in Ireland.—He tells them, “law, justice, and impartiality, must be our guides; with prejudice and passion we have nothing to do; but to subdue them. One only feeling is permitted to enter into our deliberations and to influence our decisions. I do not mean a feeling of party rancour or revenge, but the mild *sentiment of mercy*, which softens and pervades our law.” He then proceeds to state to the jury what is the English law of homicide applicable to the case. He animadverts on its rigors—pronounces it ill assorted to the manners and habits of the times— and adds, “The trammels of my office forbid my adding more. But there is another better voice than mine, to which, though I be silent, you may listen still. I mean that still small voice, of which we read in Scripture, and which addresses itself to the consciences of men in the soft and soothing accents of peace. Its dictates may be followed with a confidence the most implicit.” No! Gentlemen, you are not, under the law and constitution of this state, mere automata to be moved at any

man's bidding; the instruments of others to execute English law, in its rigor, by a verdict of conviction; while public opinion, the spirit of our institutions, and the sentiments of your own hearts, point to a different result. You have nobler attributes and higher duties. You have hearts, feelings, and judgments, which must not be surrendered to the trammels of artificial rules, that have outlived their day. You are jurors sitting in judgment in a case involving liberty, character,—all a freeman's most valued possessions. You cannot, in view of your responsibility, receive impressions or form conclusions repugnant to the sentiments of your own hearts.

I now approach a subject which I would gladly have avoided. It is one, however, which we did not introduce—it was pressed upon us against our wishes; but since our adversaries will have it in the case, I will not shrink from it, unpleasant as it is. Still I enter upon it with reluctance, because in speaking to the testimony, I may be compelled to deal harshly in relation to professional acts of gentlemen, toward whom I entertain no unkind feelings, and with whom personally, I maintain friendly relations. But I am coerced into the examination, by the extraordinary and revolting exhibition, gotten up on this trial, and for the consequences, our adversaries, and not we, are responsible. It seemed to me evident from the beginning, as well from what I saw, as what I had heard, that some extraordinary appliances were to be resorted to, and that the gentlemen had determined upon a scene. The skull was prepared for the occasion, not for the purpose of scientific illustration, or the elucidation of any surgical question, but for show. It was exhibited not as evidence, but for theatrical effect, and as soon as it had subserved its purpose, it disappeared. Nor was it all brought, only so much of it as suited their purpose was exhibited. We had not even an opportunity allowed us to test the skill of the operators, by an examination of the fragment—even that vanished as soon as the show was over.

Mr. Engle: It was deposited with the clerk.

It is on file, is it? There let it remain; nobody could expect to find it there—certainly I did not. It is well hidden where it is. I don't desire now to repeat the revolting exhibition.

The prosecutors, doubtless expecting to achieve a victory under the banner of the skull, introduced it after much preparation, with a flourish of trumpets. And then we had a sort of triumphant procession, the counsel parading before the jury with a smile, almost a shout, of anticipated triumph—the Doctor looking on with wonderful complacency. Both were so much taken up with the exhibition that neither of them perceived the indications of disgust and abhorrence, apparent among the spectators; especially the real friends of the deceased. Did the exhibitors suppose that they could alarm or disconcert us, by such contemptible appliances? If they did, they have probably by this time discovered that we are not children, to be frightened by the fragment of a skull. For my own part, I felt no other emotion than that of disgust. Its only effect upon my course was a resolve to lay aside every consideration, and come up to the disagreeable duty it imposed upon me. I thought then, that before we had done with the subject, those who introduced it would repent their indiscretion. This morning I discover that my anticipations are fully realized. They propose to take shelter behind a *doubt*. We had a hint of this expedient on yesterday, and the first thing we heard from them this morning, was a prayer to the court for instructions, in substance, that unless the jury believe, beyond the possibility of a *rational doubt*, that the death of Mr. Davis was occasioned by the treatment of the doctors, and by nothing else, they must find that he was killed by Darnes! This extraordinary appeal was no doubt suggested by the emergency, and was intended to erect an artificial defence against the consequences of their own indiscretion. While they profess to believe that they have no occasion for such an expedient, they were unwilling to trust the case upon the facts and arguments, and prudently seek shelter under cover of instructions.

An antiquated dictum of Sir Matthew Hale has been

quoted, as entitled to control your deliberations. I take leave, however, to say, that though he was unquestionably an eminent jurist, and is excellent authority on a question of law, his opinion on a question of fact is entitled to no more weight than that of any other man. No artificial rule can control the force of facts, or compel the mind to a conclusion against its convictions. Neither court nor counsel can make a jury believe what they do not believe, or force them by rule to find a fact, of which they are not satisfied by the evidence. The question in this case, like every other question of fact, is to be determined by the weight of testimony. It is the province of the court to decide upon the competency of evidence, but it exceeds its authority when it undertakes to judge of its sufficiency, in any case, before a jury, and is therefore entitled to no influence.

The dictum, upon which the gentlemen rely, apparently with great confidence, is, in substance, that if a man dies of a wound inflicted by another, within a year and a day, though it was not *originally mortal*, but became so by *neglect*, or *unskilful treatment*, it is sufficient to constitute murder, or other species of homicide, "according to the circumstances." "But if it *clearly and certainly* appear, that the death of the party was caused by ill-applications by himself or those about him, and not by the wound or hurt, it seems this is no species of homicide." The gentlemen infer from this, that in every case of a wound, however slight it must appear, beyond the probability of a doubt, that the death was caused by neglect or maltreatment, or it must be visited upon the party, by whom the wound, *not originally mortal*, was inflicted, although the jury should be satisfied, from the weight of evidence, that the death was caused by maltreatment, and not by the wound. If Sir Matthew Hale is to be so understood, I contest the authority of his opinion—because it assumes to decide upon the sufficiency of evidence, and to force the belief of a jury, and that against an established rule of law, which requires them to resolve every doubt, on any material question, in favor of the accused. Suppose a man receives a slight wound on the head, even a

severe and painful bruise, "*not originally mortal*," which if let alone would probably heal of itself, but he falls into the hands of some gentleman, who has a passion for experiments, who fancies there may be spicula, detached from the inner table of the skull, and sets himself to *boring* in search of them, dresses the new wounds in the usual manner, and leaves the patient to his fate—inflammation of the brain supervenes, and he dies within a year and a day. My word for it the operator will give it as his opinion, that the death was occasioned by the wound "*not originally mortal*," and not by the mortal wound inflicted by the trephine. It will not be difficult either to mystify the subject, by suggesting the possibility of the existence of an occult cause for the inflammation and consequent death; and the gentlemen will have Sir Matthew Hale to say, and you to believe, that because you cannot see *clearly* through the mist, and ascertain beyond a doubt, that the deceased died of the surgical treatment, you must find the accused guilty of the homicide, when you are convinced in your own minds of no such thing, and all the probabilities are the other way. In such case you, I have no doubt, would follow the dictates of your own consciences, and find according to the weight of evidence.

The substance of all the adjudications upon this point you will find in a single page of Starkie's Law of Evidence, (page 946, vol. 2.) from which I read, "Unless the death be so immediately and *obviously occasioned* by the violence inflicted by the prisoner, as to exclude *all doubt* upon the subject, the connection between the act of the prisoner and the death of of the deceased, *MUST be proved* by means of the judgment of persons of *professional skill and experience*, who have had an opportunity of forming an opinion upon the subject, or who are enabled to form an opinion from the circumstances of the case, as detailed by others." "Where there is a *doubt* whether the death was occasioned by the act of the prisoner, or some other cause, it is of course a *question of fact* for the jury." These general rules are founded on reason and common sense, and are therefore law. They constitute nearly all that we find in the books on this subject entitled to that com-

pliment,—almost all else consists in extra judicial dicta on the sufficiency of evidence in particular cases, not susceptible of general application. If the death arises not from the wound inflicted by the prisoner, but from unskilful applications or operations, he must be acquitted, and when a doubt arises on this question, that doubt is to be resolved by the jury according to the weight of the evidence. If they pass over the subject because of a doubt, they leave it where they found it; and this would be equivalent to saying that the very existence of a *doubt*, which alone brings the subject under their consideration, shall determine the question against the prisoner, thus making a mockery of the trial by jury on such a question.

It has been said that if the wounds inflicted by Darnes *contributed* to produce the death, though not originally mortal, the homicide is to be attributed to him; upon the principle, that if the death of the party was accelerated by the malicious act of the prisoner, it is sufficient in law, to charge the death upon him. It has been so held, and properly, in a case to which it is applicable,—that is “where the deceased was afflicted with a mortal disease at the time.” It is not that the blow has contributed to produce the death, by furnishing an excuse for the interposition of an adventurous operator, whose treatment proved mortal—but that the death was accelerated by the blow. Thus if a wound be given to a man in the last stage of a pulmonary consumption, and death ensue, it will be no defence to say that he would have died at all events, and that speedily; or that the same wound, inflicted on a man in health, would not have been mortal.

When a question of the kind now under consideration is to be determined in a criminal case, the prosecution ordinarily relies on the testimony of the attending surgeons, who, of course, believe that the death was occasioned alone by the wounds inflicted by the prisoner, and is in no wise attributable to their applications or operations. They must be supposed to have adopted their practice, because they believed it to be the best, and they are expected to defend it on their examination. If countervailing testimony was not admitted,

or not regarded when introduced, it would follow as a necessary consequence, that the question must be resolved against the accused. The law wisely admits the testimony of other persons of professional skill and experience, who form opinions on the facts detailed by others. The evidence being necessarily matter of opinion, the weight of which depends on the professional skill and experience of the witnesses, a case can scarcely be imagined, in which there would not be some doubt in the minds of the jury on the question, and, if that doubt must be resolved against the prisoner, the investigation in every case would be idle. It must be obvious then, that if you are to be allowed to decide the question at all, you must weigh the evidence, and decide according to its preponderance one way or the other. Even then the prisoner labors under great disadvantages. The professional character of the attending surgeons is involved, as well as the propriety of their treatment; they are introduced in a case substantially their own, and testify under the influence of a strong bias in favor of themselves; the description of the wounds, the symptoms of the patient, and the course of treatment, are detailed under the influence of that bias against the prisoner on the very point to be decided. Without imputing in this case any intention to misrepresent or conceal any thing, what is more likely than that the surgeons, whose acts are in question, should defend themselves by their testimony? It is out of all question to expect them to confess their blunders, if any were committed. I blame them not for standing up to their opinions, and defending their practice to the utmost. When they say that they resorted to the very best treatment that could be adopted, it is only saying that they did the best they could to cure, and did not intend to kill the patient. It is not our design to accuse them of intentional mal-practice. But I do say that the attending surgeons are not in any case, where their treatment is called in question, impartial witnesses; and the situation of the prisoner under the most favorable circumstances, is one of extreme difficulty on that account alone, and if there can be any question on which a doubt ought to be resolved in his

favor, it is where the testimony, which causes it, comes from witnesses testifying under a bias of interest more powerful than money. To give to such testimony (as is demanded here,) a controlling influence, is to deny to the prisoner the benefit of a fair trial on a vital question of fact. We do not accuse the attending surgeons, I repeat, of any culpable, intentional, mal-treatment or neglect, but we think, and (if the question of fact is to be decided, as all others, by the weight of evidence,) we expect to establish, and may be allowed to say, that they erred, both in the use of the trephine, under the circumstances, and in their constitutional treatment.

It has been shown by the experience of the professional gentlemen examined, and of eminent surgeons in Europe and America, and by the concurring opinions of almost all writers, whose works are regarded as authority in modern surgery, that the trephine is a most dangerous and often fatal instrument—that its use is allowable only in a few cases, and in these, in the language of a celebrated surgeon, “it has destroyed more lives than it has saved.” A trephine is nothing but an augur, called by another name—an instrument to *bore holes with*, of about three-fourths of an inch in diameter. By its use and otherwise, doctors do sometimes bore their patients most outrageously. Dr. McMartin informs us of a remarkable circumstance, of a man, who had the operation performed on his head in twenty-seven places, and yet survived, but as the doctor only read it, and did not know it, it may after all be fabulous. A man with twenty-seven augur-holes in his head, not only living, but going about fair and fat, sound and healthy! It may be so—I do not contest the fact; all I desire to say now is, that the cruelty of the doctor, who bored him, is not so remarkable, as the result is marvellous.

This witness, (Dr. McMartin,) though he was the first medical gentleman called to the assistance of Mr. Davis, and the first in attendance, appears to have been elbowed out of the case soon afterwards with very little ceremony. He took no active part in the treatment of the patient, and though

he visited him frequently, was scarcely ever near enough to see what was done. I take this occasion, therefore, to say, that when I speak of the treatment of the attending surgeons, I do not design to include him. I regard him, and shall speak of him, only as a witness, who in the matter and manner of his testimony has entitled himself to respect. I shall, however, controvert some of his opinions, and that upon authority. He informs us, that all wounds of the head are dangerous, and yet that the use of the trephine in skilful hands is neither difficult nor dangerous! Now I submit that the operation of trephining, no matter how skilfully performed, inflicts "a wound on the head;" and if all wounds of the head are dangerous, I am at a loss to discover how that inflicted by the trephine is an exception. It seems to me that the hazard must be increased by the additional wound, since the danger of inflammation is augmented. But if you will examine the medical authorities referred to, and the cases there detailed, you will be compelled to conclude, that if the trephine is not dangerous in skilful hands, it has rarely been used by such hands. It will be found, that more persons have recovered from fractures with deep depression, even compound and comminuted fractures, where the trephine was not applied, than have survived the operation, in proportion to the whole number of each. One case has been read from Sir Astley Cooper's Lectures, where the patient survived the operation of the trephine in his hands, and other similar cases might have been cited, bearing no comparison, however, to the numbers who recovered without trephining. Dr. Lane remembers three, in the course of his practice, who recovered after trephining, and a great many, where the patient did not survive, and a much larger number who recovered, without the operation. Another and the only other case, in evidence, of a patient surviving the use of the trephine, is the marvellous case *read of* by Dr. Mc-Martin, where the man contrived to live and do *well* with twenty-seven holes in his skull—his head perforated by an augur as full of holes as a piece of paste board, after it has undergone a thorough boring with a sportsman's wadding-

punch. If that is not a fable or a miracle, the man possessed a tenacity of life, three times as great as that attributed to the feline race, and a remarkably scanty supply of brains. I infer this from his submitting to be *bored*, as he was; the emptiness of his skull alone can account for his not dying of inflammation of the brain. Professor Dorsey mentions this case, and adds, "there can be no doubt, however, that the removal of portions of the skull is a very *serious evil*, and that it should be performed as seldom as possible." Liston, in his elements of surgery, says:

"Perforation of the cranium is not often resorted to, since the treatment of injuries of the head has become better understood. In former times, the operation of the trepan was performed frequently, and *many seemed to rate the dexterity and science of the surgeon, by the number of holes he was able to bore into the skull of the unfortunate patient*. It ought never to be performed, unless the necessity for, and the propriety of the proceeding be *clearly indicated*." * * * "The operation is of itself attended with *danger*, and likely, under many circumstances, to *aggravate the patient's symptoms and diminish his chance of recovery*."

There are many other authorities, all proving that the operation is both dangerous and difficult, some of which have been read to you. I will invite your attention only to one more, and that because the prosecutors profess to rely upon it. I mean the work of Sir Astley Cooper. He says:

"Forty years ago, trephining used to be the plan generally adopted with patients admitted into the London Hospitals; many were submitted to the operation, inflammation of the membranes of the brain supervened, and nearly all died, recovery being very rare." * * * "After the expiration of my apprenticeship at these hospitals, I went over to Paris, to see the practice of Dessault, at the Hotel de Dieu; and I found that scarcely ever, under any circumstances, did he trephine; and he was more successful than the English surgeons."

It is true, that Sir Astley Cooper was here treating of concussion; but the danger of which he speaks must be equally great in cases of fracture. If inflammation of the membranes of the brain supervenes in one case, there is no reason why it should not in the other. The same author in a subsequent part of the same work treats of fractures, and places his

opinion on this subject beyond controversy. He often entreats and advises his students to forbear the use of the trephine, until the urgency of the symptoms leaves them no alternative. With great earnestness he counsels them to extreme caution, when, as a last resort, the operation must be performed. Under the head, "*Danger of the operation,*" he says,

"Some surgeons say, that this is a trifling operation, and not difficult to perform; but they would deceive you; it is one of the most dangerous operations in surgery; whilst performing it, there is but a thin web between the instrument and the brain; cut through this, and the destruction of life will generally be the consequence."

You will perceive then, that, according to Sir Astley Cooper, as well as several other eminent surgeons, whose opinions were read or delivered to you orally, the operation of trephining is both dangerous and difficult. But perhaps you will not be satisfied with mere opinions, from however high a source, unless they are supported by reason. In this case, I think, you will find no difficulty on that account. The subject is, comparatively, of easy comprehension. Every intelligent man, who knows enough of the instrument to understand how it is used, need only to reflect a moment on the structure of the human head, and he will at once perceive, that the operation necessarily must be eminently dangerous. The cutting part of the instrument in shape somewhat resembles a large punch, the lower edge cut into teeth like those of a saw; the motion is circular, and it cuts out a round piece, called a button; and certainly, if applied to a bone of a flat surface, on both sides and of equal thickness, it would cut out its *button*, without injury to anything beneath. But the human skull, as you know, is far from being flat, or even regular, in any part of its exterior surface, and this alone makes the operation difficult in many cases; but the chief difficulty and the greatest danger arises from the inequalities in thickness of the skull, and the irregularities of the inner table, in consequence of which one part may be completely cut through, before the other is nearly divided;

there is, therefore, great danger of wounding the dura mater in the operation, and such wounds are almost always fatal. There must then be great danger in all cases, and in some it cannot be avoided by the most skilful operator. Hence it is, that since the advantages of Hey's saw have become known, the trephine has been almost entirely abandoned, and is never resorted to, until all other means of relief fail. Besides, the principal, if not the only danger, to be apprehended from wounds of the head, is inflammation; and that danger is increased by the additional wound inflicted by the trephine. For this reason, depletion before and after the operation, is so earnestly recommended by all writers on the subject. It is in view of the many and great perils, attending and following the operation, that it is forbidden by every eminent modern surgeon, except in cases rendered desperate by the presence of symptoms of compression.

What are the symptoms which will warrant the use of the trephine, have been stated by Doctor White, in clear, distinct, and intelligible terms. He is supported by the other surgeons examined, and by all the authorities read; but on this point there is no controversy, and I will not fatigue you by reading a description of the symptoms. The point I make is, that the operation is not justifiable in a case where those symptoms are not developed. Professor Dorsey of the University of Pennsylvania is direct and explicit on this point. He concludes, after an examination of authorities, that the trephine is only to be applied with a view of relieving *present symptoms*, never to anticipate them; and this opinion, he says, is confirmed by his own experience. Dr. Samuel Cooper, a surgeon of great experience and distinguished eminence, in his "Practice of Surgery," (a work of undoubted authority,) says, "The only *sound reason* which can ever be given for its use, is the removal of such pressure from the brain as gives rise to *existing symptoms* of a dangerous tendency." Professor Gibson, one of the most eminent surgeons of modern times, says, "The rule in all cases of the kind should be to refrain from an operation so long as the contents of skull remain unaffected, and of *this the surgeon is*

to judge by the symptoms." What these symptoms are, he informs us in another place, almost in the very language of Dr. White. And even where the symptoms of compression exist, he recommends bleeding and the exhibition of cathartics in the first instance; and he then says, "If notwithstanding this treatment, the comatose symptoms continue, and there is reason to believe that the brain is oppressed by coagulum, the trephine must be resorted to, whether the skull be fractured or not. The same observation will apply to *fracture with depression, always recollecting, however, that the symptoms call for the operation, and not the fracture*; and that the skull, if the brain be uninjured, will often unite like any other fractured bone, even although the depression be left." These and other authorities, as well as the cases read to you from Henning and others, fortified by the opinions of experienced surgeons, delivered to you orally, are conclusive that the operation ought not to be resorted to in the absence of symptoms of compression. It is contended, however, that Sir Astley Cooper is of a different opinion. He does indeed say that, "in compound fracture with depression, unattended with symptoms of compression, it is best to trephine, *or to raise the depressed bone by the elevator.*" But, as I have said, he enjoins it on the student to forbear the use of the trephine when it can be avoided, as a dangerous operation. And he says, "Fractured portions of the bone may be often raised by the elevator; and I may observe here, that this is the instrument I recommend in cases in which it can be employed without the use of the trephine." In another place he says, "The treatment of fractures of the skull is as follows: Where there is fracture unaccompanied with symptoms of injured brain, you will *not trephine*. Let your constitutional treatment be that of depletion, by means of blood letting and purgatives." And again, he cautions the student not to be precipitate, lest irreparable mischief arise.

It has been conclusively established by the evidence, and is even admitted by the prosecutors, that in the case under consideration, the symptoms, which I think, it has been shown, alone warrant the use of the trephine, were not pres-

ent; and I am persuaded, that it will appear, that the operation was resorted to, in defiance of authority, for the purpose of experiment. This I am aware is strong language, but I expect to justify it by the evidence, and mainly by that of the attending surgeons themselves, by the authorities to which I have referred, and by the opinions of eminent surgeons, who have been examined as witnesses, and who are entirely disinterested.

We are, as I have said, necessarily dependent on the attending surgeons, not only for a description of the wounds and a detail of the symptoms, but for an account of their course of treatment. They have an interest in the issue; their professional character and conduct are directly involved. They are, of course, expected to disclose their course of treatment fully, in all its details; at least, they are supposed to give all the particulars of their practice, which they regard as defensible. I cannot, therefore, imagine, that they have omitted to state anything, which was done, and they think ought to have been done; but must conclude, that they have given a full account of all their proceedings. The case is represented by them to have been an extraordinary one; and surgeons generally keep a diary of their proceedings, or at least remember them, especially when they know that their treatment will be called in question.

It appears, that after Dr. McMartin had been called in, Dr. Sykes was also sent for. He says, that the moment he saw Davis, and examined his wounds, he considered his case dangerous, and required the advice of "*the most eminent surgeon in the city.*" He determined upon a consultation, and immediately sent for his professional partner, and no one else. Dr. McMartin appears to have been unceremoniously set aside, and none but the partner invited to the *consultation*. This was, I think, to say the least, very singular, if not indelicate. When a consultation is desired, surely it is not usual to limit it to the two partners, who are already in the case. There are, probably, no two members of a firm in the city, who do not think each other eminent; at least they are not apt to say otherwise, while the partnership continues.

Would such a consultation satisfy you? If, after engaging a physician in a case of imminent danger, you should request a consultation, and he should send for his partner only, would you be content? When a partner is employed, I take it, the firm is employed, and the patient is entitled to the full benefit of the professional skill of both partners. If partners do their duty, they confer with each other in every case of doubt or difficulty, committed to their care. Is that a *consultation*, in the sense of that term as used by medical men? No! gentlemen, there could have been no such imminent danger at that time, as to require a consultation. I will not suppose that Dr. Sykes would, in such a case, so far neglect his obvious duty, as to send for no one but his partner. He must have regarded the case as one not so difficult or dangerous, but that he and his partner could manage it, without the aid of professional consultation. I will not suppose, that he did not think any of his other professional brethren in the city worthy of an invitation. No; the real danger in the case, I expect to show, arose afterwards.

Immediately after the arrival of Dr. Beaumont, trephining was resolved upon, and the operation was performed in two places that evening, and within three hours or less after the wounds were received, without a single symptom of compression appearing. The wounds were then dressed, they say, in the *usual manner*, and the patient left comparatively *comfortable*. Nothing else was done or thought advisable, that day, either before or after the operation. One witness says, that he is under the impression that the patient was bled—thinks it was on the morning of the second day; but Dr. Sykes, who ought to know best, and cannot have forgotten any thing he did, in a case which he says was so extraordinary, does not mention the use of the lancet, or any constitutional treatment, until Thursday, three days after the operation, when inflammation had supervened to an alarming extent. Indeed, from the account given by Dr. Sykes of the treatment, we are forced to the conclusion, that beside the operation of trephining, very little was done—and that not until the patient was in extremity.

While Dr. Sykes was under cross-examination, we endeavored to elicit from him a description of the symptoms, which, in his judgment, indicated trephining as the appropriate remedy. He cut us short by a remarkable declaration, which surprised me exceedingly, and my surprise has not diminished by reflection on it since. He said, that the case was an extraordinary case, unlike any in the books, or any I have ever heard of, or read of, and they treated it in the best manner, *according to the books*. I have not quoted his precise language, but I am certain that I have given the substance. And the declaration is quite as extraordinary as the case, it was intended to describe; but it affords an explanation of the object of the course of treatment adopted. It was an anomalous case—it seems, unlike any before heard or read of, and yet was *treated according to the books*! This is, I confess, some fathoms too profound for my comprehension, unless it means, that there were no symptoms to justify the use of the trephine, but there *ought to have been*. They found no case mentioned in the books, where there *ought to be*, but *are not* symptoms of compression—no such case ever before occurred—therefore this extraordinary, this anomalous case could not have been anticipated; and they determined to try the virtues of the trephine, operating *according to the books*! What is this but an experiment?

Dr. Beaumont (if I quote his testimony correctly, for I was not present at his examination,) said that there were no symptoms of compression—that he trephined to anticipate those symptoms, and to prevent inflammation. Am I right? Here then we have additional, conclusive proof that the operation was an experiment, and nothing *more* nor *less*. He was boring in anticipation of symptoms—hunting for spicula, the existence of which was not indicated by any symptoms. The proceeding was against all authority,—against all experience—mere guess work.

Let us now enquire what plausible apology there was for setting at naught all authority, and resorting to an experiment so difficult and dangerous. The gentlemen prosecutors, if I understand them correctly, contend that trephining is

proper, even when there are no symptoms of compression, if from the number and external appearance of the wounds, such symptoms may reasonably be anticipated. The first remark I have to make upon this is, that it is the suggestion of the counsel, not of the surgeons themselves; *they* do not take that ground, for they did not and *could not*, on their examination, explain what they discovered, which warranted the conclusion that compression existed; if anything of the kind had appeared, they could, and in discharge of their duty to themselves and to you, should have explained what it was, in intelligible language—but on this point, as in many others, they dealt in vague generalities, as if they supposed they were not bound to give a reason for everything they did. They tell us indeed that the head was badly fractured—at one place a fissure—a fracture near the left ear—and they trephined at neither. The other two were compound fractures, with considerable depression, one of them comminuted, and these are supposed to have indicated the operation, for at these places it was performed. Now if I have read the authorities aright, it is the *symptoms* alone, and not the *fractures*, that call for the operation. One of them, Liston, is of opinion, that where there is a compound fracture, occasioned by a sharp instrument, that is, what is called a punctured fracture, “it is generally attended with splintering of the internal table, and the existence of such a wound, without any present disturbance of any of the sensorial functions, is of itself sufficient warrant for the use of the trephine;” and he defends this opinion with considerable force of reason. It seems to me, however, that if the splintering the internal table is not the universal and necessary result of the wound, it does not follow that the trephine should be applied as a matter of course, for after all, no portion of the inner table may have been detached, and if it were, that fact would be indicated by symptoms, if I read the authorities correctly. It is not a matter of importance in this case, however, since it is not pretended that any of the fractures were of that description. And Liston concurs with the other writers, in rejecting the use of the trephine, unless

there be present symptoms of compression. He even says, "if the *indications of compression* are not *very alarming*, the coma not *very profound*, a little delay is allowable, means being taken to arrest inflammatory action; for if danger is not imminent, cure may not be expedited by operative aid, and there is chance of injury resulting from rash interference." The cases in the books are numerous of compound and even comminuted fractures with deep depression, and some of them attended with disturbance of the sensorial functions, where the operation was not resorted to, and the patient recovered, by the aid of anti-phlogistic regimen alone. Drs. White, Lane, and Knox, mention several occurring in their own practice, or that of others under their observation. It cannot be, therefore, that the number or external appearance of fractures, (not punctured,) can furnish a justification for a resort to the trephine; especially when the operators can furnish no intelligible reason for their conclusions, or why the wounds in the particular case justify the operation, more than others of a like description.

Though depression is not always followed by compression, even in compound and comminuted fractures, and the patient often recovers without any alarming symptoms, it may be advisable in such cases to elevate the depressed bone, and take away those portions which may be detached; but this may be done without the use of the trephine, by the aid of Hey's saw and the elevator. Professor Dorsey says, that in most cases, they may be substituted for the trephine in removing portions of the skull. Sir Astley Cooper concurs, and earnestly recommends the use of the elevator to raise depressed portions of bone. He says that the rule, which he follows, is this: "When he is called to a compound fracture with depression, which is exposed to view, whether symptoms of injured brain exist or not, he generally uses an elevator, and very rarely the trephine. He puts the instrument (the elevator,) under the bone, and raises it, and, if it has been comminuted, removes the small portions of bone." It is said that Dr. Beaumont did try the elevator, at one of the fractures, without success; but he states no reason

why he could not raise the depressed bone by means, which in other hands are usually successful. Another apology for the operation is found in the fact, that in one of the fractures there was a detached fragment of bone, which the Doctor could move with his finger. I apprehend I need not cite authority to prove, that the removal might have been effected by the forceps, at least without the use of that dangerous instrument, the trephine, which ought never to be resorted to, where it can be avoided. It is recommended only in desperate cases, where there is no other remedy. Though dangerous, it possibly may, but seldom does, save the patient.

One of the reasons for the operation, as furnished by Dr. Beaumont, is, that it was necessary, and was performed "to anticipate symptoms of compression and to prevent inflammation." If I understand his meaning, it is in the very teeth of all the authorities;—all concur that the trephine is only to be applied with a view of *relieving present symptoms*, not to anticipate them. As you must have discovered from what I have already read, one of them is very explicit on this point. Dr. Samuel Cooper says, "The only *sound reason*, which can ever be given for its use, is the removal of such pressure from the brain as gives rise to *existing* symptoms of a dangerous tendency." It must be so not merely because it is supported by the opinions of the surgeons, whose works have been cited, and of those who have been examined orally; but it is supported by reasons, which address themselves to the understanding. It is certain, that in all cases of fracture and concussion, there may be compression of the brain; and if you may trephine to anticipate the symptoms, none existing at the time, the operation may be justified in every case—difficult and dangerous as it is. It is in proof, that even compound fractures with depression, have been cured without any symptoms of compression and without the use of the trephine. How then shall a surgeon discriminate, unless it be by existing symptoms? How can he be justified in an operation so dangerous to life, before he can know whether it will be necessary or not? When there are present symptoms of compression, the operation of trephin-

ing may be said, in one sense, to prevent inflammation by removing the cause; but, to my mind, the idea of preventing inflammation by trephining, when there is no present symptom to authorize the belief that the cause exists, is at least novel. The operation is of itself an exciting cause of inflammation, and whenever it is resorted to, it is advisable to counteract that cause: for inflammation of the membranes of the brain will generally succeed the use of the trephine when there is no other exciting cause; and when there is the operation augments the danger of inflammation. This is the conclusion I draw from what is said by Sir Astley Cooper, and other eminent writers on the subject. From the same authorities I infer also, that the appropriate remedy for preventing, or keeping down inflammation, is by constitutional treatment, which I fear has been too much neglected in this case. Professor Gibson says, to counteract inflammation of the brain or its membranes, the most active antiphlogistic measures must be pursued. "Blood letting is more to be relied on than any other remedy." "Purgatives also may be found essentially necessary." This we can understand; but the idea of preventing or counteracting inflammation, by multiplying its causes, cannot well be understood, at least, without further explanation.

The next apology for the operation is founded on an intimation of the surgeons, that probably, there *might* be spicula, which might irritate the membranes of the brain and cause inflammation; and they bored in search of them, though there were no present symptoms to indicate their existence. Now I take leave to inquire, what greater reason there was in this case, to suspect the existence of spicula, than there must be in every other of concussion or fracture, (not punctured)? If symptoms are to be anticipated in this case, why not in every other? If there was a difference between this and other cases, the surgeons ought to have been able and willing, it was their duty and their interest, to furnish their reasons for the distinction. If spicula existed, the fact would have been indicated by symptoms in time sufficient for the operation; if they had penetrated through the dura mater

into the substance of the brain, the indications would have been unequivocal. After all, what was the result of the experiment. One or two fragments of bone were removed, probably those which the doctor found loose under the finger, and might have removed easily without trephining; but the spicula he was in search of, were different, supposed to be beneath the skull, detached by the force of the blow, and these he did not find, or at least did not remove them. He either bored at the wrong place, or he was not satisfied with the boring, and left the spicula, if there were any, to take care of themselves. The experiment turned out to be fruitless, if not fatal. Says Sir Astley Cooper:

"There cannot be a more absurd and injudicious practice, than that of making incisions through the scalp, (and I may add, or boring holes through the skull,) to ascertain the exact extent of the injury which the bone has received, when there are no symptoms to justify the procedure, because they produce new dangers to the patient, and add to that, which the injury would itself produce."

In my judgment a surgeon who exposes a patient to the dangers of the operation, for no better reason than a conjecture that possibly there may be spicula detached from the skull, which may do injury, has a passion for experiments. Boring for spicula! We may smile at the folly of those who spend their time in exploring our hills, and their substance in penetrating the earth, boring and blowing rocks, in search of hidden treasures, upon no better authority than the indications of a divining-rod; but very different emotions are excited, when we hear of the more dangerous, though not less absurd operation, of exploring the human head, and boring for spicula, on no better authority than a guess.

It has been shown, I think satisfactorily, that the operation of trephining is difficult and dangerous, as well by authority, as by reason founded on the form of the instrument and its operation, and the structure of the human head—that it cannot be justified in any case, where symptoms of compression are not present—that in this case it was resorted to as an experiment, against admonitions of experi-

ence. I think it will be made equally manifest, that the constitutional treatment has not been such, as it ought to have been. Sir Astley Cooper says, "Let your constitutional treatment be depletion by means of blood-letting and purgatives." This is his recommendation in all cases of fracture, and he adds: "Where the brain receives a wound, you must commence your curative exertions by abstracting as large a quantity of blood from the system as the constitution of your patient will bear." I have already shown you that the operation of trephining ought to be preceded, or immediately followed, by blood letting. All surgeons agree that depletion must be resorted to in cases of injury to the head, in order to prevent or mitigate inflammation. In this case, it does not appear authoritatively, that Mr. Davis was bled before Thursday, or more than once; nor does it appear that any purgative was administered, before inflammation had supervened to an extent to render the case hopeless. If any more was done, the surgeons must have known it, and ought to have given it in evidence. Such important facts ought not to have been left to the vague conjectures of others, in a case, where it was known from the beginning, that the treatment of the patient was called in question. I can suppose it possible, that there may be cases, where bleeding ought to be deferred, and if this was one of them, it ought to have been made to appear. Considering this case then, according to the evidence, I cannot but conclude, that the requisite constitutional treatment was neglected, or but carelessly attended to, until the patient was in extremity. Whether the operation of trephining was necessary or not, antiphlogistic remedies ought to have been adopted, and diligently pursued immediately after the operation, if not before. It is not wonderful, that Davis died of inflammation of the brain, when so little care has been taken to counteract it. If the authorities are regarded, the conclusion is irresistible, that he could not have survived under such circumstances, if he had no other wound but those inflicted by the operation.

We come now to the post-mortem examinations; for Coroner Owens says there were two— he is so much pleased with

the Latin name for an inquest, that he will have it so. The first was held officially by the Coroner, to ascertain whether the deceased died a natural or unnatural death—for, by a strange perversion of terms, when a man dies in the hands of a physician, it is called a natural death; when he dies without medical assistance, it is an unnatural death—by the visitation of God. It was ascertained by the Coroner's *post-mortem* examination, that Mr. Davis did not come to his death by the act of God. I infer so, because it was immediately followed by the doctors' post-mortem examination, which, so far as I can judge, was designed to charge the death to my client, and clear the skirts of the doctors. What else could it have been for? It was for no scientific purpose certainly, for no body but the attending surgeons was allowed to take any part: all others were mere spectators. Besides, the examination began and ended in sawing off a part of the skull, and in a view of that part of the interior of the head exposed by the operation. It has not since served any better purpose, than to furnish Dr. Sykes with fragments of bone, including the buttons of his own manufacture, for exhibition to the ladies, and a larger fragment prepared for show, here and elsewhere. It was shown to those whose business or pleasure called them to his office, and brought here and shown to the jury, with a display, from which one might infer that it was conclusive of the case, and proved beyond all question every thing that the Doctor desired.

The whole proceeding was commenced, carried on, and ended, by the attending surgeons. They selected the persons to be invited, had them summoned to attend the inquest, where they were not wanted, and called them in as spectators to the doctors' post-mortem examination, for which they had been originally selected. What were they invited for? To take part in an examination appertaining to their profession, for the advancement of the science of surgery? or were they originally designed to be, as they in fact became, mere spectators? Some of those invited did not attend, probably because they suspected the use intended to be made of them, and regarded the whole affair as a humbug. And those who

did attend, are they among the most eminent surgeons in the city? I put this question to Dr. Sykes on his examination, because (whatever may have been my estimate of the professional ability of those of them whom I knew, and I believe there were but two known to me,) it was proper that the jury should know the reason which influenced the selection. It was a direct and pertinent question, entitled to a direct and pertinent answer. Dr. Sykes, however, answered shortly, "They are *respectable gentlemen*." Why not say, if the fact be so, they are skilful surgeons, as well as *respectable gentlemen*; that much at least was due to them from Dr. Sykes, and to himself, if they really were invited to a scientific examination. But the gentlemen may appropriate Dr. Sykes' compliment as they please. My business is with his reason for the selection, as given by himself. The professional merits of the other gentlemen may greatly exceed his, and probably do, but *his* only reason for inviting them was, that "they were respectable gentlemen,"—that was a sufficient qualification for mere spectators, which was all they were wanted for, unless they should be required as witnesses. Why were not others invited? We know that the number of those abundantly qualified is by no means limited. Surely if the cause of science was designed to be subserved by that post-mortem examination, the invitation would not have been confined to a few, who, in the estimation of those who projected it, are only "respectable gentlemen." Formerly a defendant was allowed in certain cases what is called *wager of law*, that is, to bring into court with him eleven other "respectable gentlemen," called *compurgators*, and if the defendant would swear that he owed the plaintiff nothing, and his *compurgators* would state upon oath, that they believed he swore truly, the plaintiff was turned out of court. From what we have heard of that post-mortem examination, I am forced to conclude that the gentlemen invited to it were intended to act as *compurgators* for the attending surgeons, to justify the treatment which had been called in question. But where are they? Some of them I know were summoned as witnesses, and have been in attendance during the trial.

Why have they not been examined? Why has not a single one of them been brought to the stand to testify? Was it ascertained that they would not say, that they believed the treatment to be correct? They were allowed to take no active part in the post-mortem examination, though invited; and it seems, it was thought prudent to exclude them from the examination here, though ostensibly summoned for the purpose.

Whatever may have been the object of calling those "respectable gentlemen" to the post-mortem examination, for any thing they were permitted to say or do, they might as well have been anywhere else. Those alone, at whose instigation, and for whose benefit it was gotten up, were allowed to take a part in the operation, and they alone are brought to testify here. They had a deep interest in making discoveries to justify their pernicious practice. Their treatment had been called in question; it was condemned by authority, and they felt the necessity of reasons to excuse it. They had made an experiment by guess, and in the emergency, they thought it expedient to prove, if possible, that their conjecture was right. They were anxiously endeavoring to make discoveries, which would furnish an apology for a dangerous and desperate operation, not indicated by symptoms. Under these circumstances, it can scarcely be wondered at, that they suppose they have made the discoveries so important to them, and so anxiously sought. It rarely happens, that men cannot find reasons to justify, in their own minds, any of their acts, when it is their interest and their anxious desire to find them. It was in search of such reasons, that the post-mortem operation was performed, and the operators imagine they have found them. They tell us, that they found at one place, (mark it,) where the trephine had been applied, several fragments of bone, and the brain fallen in to a considerable extent; at another, where they had not operated, there was an effusion of blood, occasioned by the rupture of the middle artery of the dura mater—that the patient died from the inflammation of the brain—that the presence of spicula at the one place, and effusion of blood at the other, caused the inflammation, and occasioned the death, and they attribute all

to the wounds inflicted by the accused, which, they say, were mortal, and the patient could not have been saved by any skill. Before I proceed to consider the value of these discoveries, I take occasion to caution you, not to allow the facts, said to have been ascertained after death, to be confounded with those which existed at the time of the operation. The treatment, if it can be justified at all, must be justified by the condition of the patient at the time it was adopted. A surgeon can be allowed to guess at nothing; he cannot be defended, if he resorts to an operation so full of danger, upon the conjecture of the existence of a fact, not indicated by symptoms. I do not admit that surgery is, at this day, a conjectural science; and no man can claim to be an accomplished surgeon, who shuts his eyes upon the light shed upon the science in modern times, and operates upon conjecture.

They bored for spicula, and did not find them until after the death of their patient, and then at the very place at which the operation was performed! And now I enquire of them and of you, if these spicula existed at the time they applied the trephine, why were they not removed? What was the design of the operation? If they could not find the object of their search, before the death of their patient, the operation was at least, as fruitless, as it is known to be dangerous. When, therefore, they operated in the absence of symptoms to justify them, and made an experiment by guess, they either did not discover the objects of their search, and thus were not excused, or having found them, did not remove them. In either case they committed a gross, if not a fatal, error. They are at liberty to take either horn of the dilemma. It has already been shown, that if spicula had existed, their presence would have been indicated by symptoms, which no surgeon could mistake. Without such symptoms existing at the time, trephining is not justifiable; and he that takes the responsibility of a hazardous experiment, must furnish some better excuse, than that which it attempted to be set up in this case.

But they tell us, that they discovered after death, that there

had been effusion of blood, occasioned by the rupture of the middle artery of the dura mater—and why was this not discovered before? Nothing is more clear than that an effusion of blood upon the brain is indicated by symptoms of compression. If the artery had been ruptured by force of a blow, the symptoms of compression would have preceded the symptoms of inflammation, and would have been detected by an attentive, skilful surgeon. If the rupture occurred afterwards, the surgeons, not the accused, must be held responsible for the consequences. I speak upon the authority of the concurring opinions of all writers on this subject, when I say, that the symptoms of compression from extravasated blood are the same as when the brain is oppressed by other causes. “These symptoms do not occur immediately after the accident; but in a short time after, the patient falls into a comatose state, and then the apoplectic stertor begins. The remedy to be first employed, is free depletion by blood-letting and purgatives.—By pursuing this plan, the symptoms often abate, or are so entirely removed as to render an operation unnecessary. If after this treatment the comatose symptoms continue, the trephine may be resorted to.” “If there be a bruise or a fracture indicating the spot, at which the injury has been sustained, you may trephine after every other means have been tried ineffectually.” In other words, if the symptoms do not yield to depletion, you may trephine to seek the extravasation; “always recollecting, however, that present symptoms call for the operation, and not the mere fracture or other wound”—“And where it does become necessary to trephine, the patient, from previous depletion, will have a better chance of recovery.” If then the effusion of blood was occasioned by a wound inflicted by the accused, how happens it that there were no symptoms of compression? How will the surgeons justify themselves, for neglecting to adopt and pursue antiphlogistic remedies, which so often effect a cure; and, when they do not, are so essential to the recovery of the patient, when in the last resort the trephine is applied? And if, in this case, trephining was deemed necessary at all, why was it not performed at the place, where the injury,

which they now say caused death, was indicated by an external wound—a fracture immediately over the artery? If the fracture there was as serious as they describe it to have been, why did it not suggest itself to them, that the artery was wounded? Why did they limit their search to other places, and neglect that? Why hunt only for *spicula*, which are not likely to be detached by a blunt instrument; and not for extravasated blood, so likely to follow a fracture, immediately over an artery of the dura mater? Why trephine everywhere but at the only spot where it might have been of service, and would have been justified, if there had been present symptoms of compression? But no such symptoms existed at all in the case, and therefore trephining was justifiable nowhere. If an experiment was to be made in the absence of symptoms, it would seem to me, that it had better been made, where there was the greatest likelihood of its doing some good. Let it not be said, that it would not do to trephine at that place, because of this danger of rupturing the artery, for that would be an admission, that they had then no reason to suspect that it was already ruptured; besides, I have the best authority for saying, that if an artery of the dura mater be opened, either by a fragment of the bone, or by the operation, the bleeding may be easily arrested, and the artery secured without difficulty; it has often been done. I repeat it then, if the experiment was allowable at all, it was at the very place of all others most neglected.

There is danger, gentlemen, in mixing up the events succeeding the operation with the facts as they existed at the time. And I entreat you not to suffer yourselves to be deceived by the attempt here made to confound them. The design of the post-mortem examination evidently was, if possible, to make discoveries which might be used to justify an experiment, unwarranted by the condition of the patient at the time it was made; but the surgical question must still be determined by the symptoms existing at the time of the operation, and not by after events. A dangerous operation at one place, cannot be justified by an after discovery, that possibly it might have been of service at another. Eminent

surgeons can have no occasion to defend their practice by any such expedient. It is said, however, that the patient died of inflammation of the brain. This is not disputed, and yet it determines nothing. The result is by no means surprising. Inflammation, we know, follows as a consequence of the operation of trephining, as it does other wounds of the head. When that operation is performed, and the only means known to surgery for preventing or counteracting inflammation are neglected, is it wonderful that the patient should die of inflammation of the brain? Professor Gibson says,

"If the patient dies after the operation, it is *commonly* of inflammation of the brain, or from suppuration within its substance, and this will show the propriety of combatting inflammatory action, both before and after the operation."

The other writers, to whose works you have been referred, hold the same opinions. When we consider, that in this case the operation was performed in defiance of the counsels of experience, and that antiphlogistic remedies, which, in such cases, are indispensable, were almost entirely neglected, we are forced to the conclusion that the deceased, most probably died of the wounds inflicted by the trephine, and the neglect of appropriate constitutional treatment.

There are some other matters connected with this branch of the subject, which I wish I could pass over in silence, consistently with my sense of duty; but the relentless spirit of intolerance, which distinguishes this prosecution, has not exhausted itself in harsh denunciations of the accused, or imputations upon his counsel; it has extended itself to the medical gentlemen introduced by us as witnesses. It was right and proper for the counsel to defend to the uttermost, the claims of the attending surgeons to professional eminence, for their skill was directly at issue. Nor did I blame them for drawing on their imaginations for material to sustain them, when, as it seemed to me, the testimony furnished so little. But I did not expect that the main effort to uphold their pretensions would consist in an attempt to pull down the professional reputation of others. I have been disappointed in this. A fierce assault has been made on our med-

ical witnesses; and my friend, Dr. Lane, has the honor to be distinguished as the object of special attack. Since gentlemen will carry on the war in this relentless spirit, and force upon us the duty of meeting them, I shall enquire into the authority on which they make the flourish about the professional eminence of the objects of their special favor, and sneer at all other professional witnesses. They have drawn the sword, and I have no alternative but to throw away the scabbard.

Dr. Lane said, that during a professional experience of many years, he had frequently been called to cases of wounds of the head, and stated it to be his opinion, founded on experience, that trephining is a difficult and dangerous operation; and he gives as one reason for this opinion, that he had performed the operation in many cases where it was called for by symptoms, and in only three of them the patients recovered; but that in numerous cases of fracture with depression, some of which he described as not only compound, but in all respects as dangerous, (if the external appearance alone is regarded,) as any of those in the case now under consideration; in these he did not apply the trephine, and the patients recovered. The gentleman (Mr. Gantt) attempted to break the force of this testimony by a sneer, which he no doubt supposed would be as withering as it certainly was ill timed and unprovoked; adding the remark, *that "no doubt the trephine was a dangerous instrument in such hands,* though it would be not only innocent but beneficial in skilful hands!" And who is Dr. Lane, that his testimony is thus attempted to be set aside, and his professional character withered by a scornful sneer, and a contemptuous remark? He was an acting surgeon in the army, when I and some others I see present were also in the military service of the country, twenty-seven years ago—in the midst of the war, which afforded him abundant opportunity, to acquire practically, a thorough knowledge of his profession. He has resided in this city near a quarter of a century, and is generally known and universally respected as a physician and a gentleman. He has earned for himself a high pro-

fessional and private character. His practice in all the branches of his profession has been and is extensive. His experience, and his capacity to profit by it, is as great as that of any surgeon among us. It is rather adventurous to sneer at his professional acquirements among those who know him, as well as do the people of this city. Some of you, gentlemen, perhaps all, know him personally, or by reputation. I have known him intimately many years,—and I regard him, as do all who know him well, as a gentleman entitled to respect and confidence as a man and as a physician,—of unblemished private character, and high professional attainments. He is my personal friend, and it grieves me to be compelled to witness the scornful and contemptuous treatment he has received. There was nothing in the matter or manner of his evidence to call for it. He testified in a clear, straight-forward, and intelligible manner. He is above making a mystery of a matter, by employing technical language, when in plain English it is easily comprehended. He described the operation and the cause of its great danger in terms which you must have understood, and which carried conviction to every mind, that the trephine must be a dangerous instrument, and its use justifiable only in desperate cases. Like Sir Astley Cooper, and all conscientious men, he is above the miserable weakness of attempting to conceal untoward cases in his own practice. He is frank in acknowledging his own failures without a question, and reserved only when he is required to speak of those of others. And this witness is met with a scornful and contemptuous sneer, and pronounced to be a bungler! It will be found, I think, to have been as ill advised and injudicious, as it was ill timed and uncalled for. It has provoked the inquiry, how many of the patients of Drs. Beaumont and Sykes have survived the trephine in their hands? This is, I know, a delicate question, but it has an advantage, which the remark I have referred to has not,—it is pertinent to the matter under examination. Their claim to professional skill is directly in issue, and it was their right and obvious duty to sustain it, if they could, by proof. And yet we know of but one case

on which they did operate, and that was unsuccessful. It is the very one in which their practice is questioned.

I come to another question of their own making. Have these gentlemen established so high a professional reputation, have they proved themselves to possess such skill in the science of surgery, that they are at liberty to set at naught the counsels of experience, and originate a new course of practice upon their own authority, and go unquestioned? It is a legitimate inquiry, not only because it has been introduced by the prosecutors, but because it is pertinent to the case. The gentlemen felt it to be so. They knew that under the circumstances, it was important for them to resort to the professional skill and ability of the attending surgeons, as their warrant for the experiment; and, accordingly, we have been entertained with high wrought eulogies on their professional eminence; but, unfortunately, the facts on which they were founded were assumed, not proved, by the evidence. It is true that Mr. Gantt did refer to the compliments bestowed by Doctors Sykes and McMartin on Dr. Beaumont, and a work on digestion written by the latter, as the foundation of his fame:—and these, which I shall presently examine, constitute all in the evidence he could refer to—all else existed only in his imagination and his private opinion, which are both foreign to the case. The surgeons may deserve all the compliments so lavishly bestowed upon them, but their professional skill is involved in the issue, and must, like every other fact, be established by evidence. Neither the private opinions or knowledge of the prosecutors, nor mine, have any thing to do with the case. I do not feel myself at liberty, if I were so inclined, to go out of the evidence. Their claims to professional skill must stand or fall by the testimony, so far as they are involved in this case. If they are what they claim to be, and have neglected to prove it, it is their own fault—I have nothing to do with anything but the testimony, and of that I shall speak as it is. I can consider nothing within the inquiry but the facts, upon which they have chosen to repose their pretensions.

I know nothing in the evidence, which can be relied on to support the claims of Dr. Sykes to very high professional eminence. He published no medical work, and not one of the witnesses has favored him with any compliment for skill in surgery; of his practice we have heard nothing, except in the particular case under consideration, and another, which the gentlemen were unwilling to hear, and had it excluded. Dr. Beaumont stands in somewhat more favorable ground. He is entitled to the full benefit of the compliment, (if it be of any value) implied in the declaration of Dr. Sykes, that he thought the case of Mr. Davis, one requiring the advice and assistance of the most eminent surgeon in the city, and therefore he sent for Dr. Beaumont. Now, without intending any disrespect to either of the gentlemen, this declaration, in my judgment, is of little value in establishing Doctor Beaumont's claims to skill in surgery. It is the compliment of one partner bestowed on another, and is in the nature of self-praise. Their professional character and their interests are substantially identified, and they share the profits resulting from the advancement of each. Dr. McMartin says, that he has been for some time personally acquainted with Dr. Beaumont; had heard of him before as the author of a work on digestion, by which he had acquired a reputation for skill in surgery. The case, and the treatment of it, is reported in the work I mentioned; and the reputation, of which Dr. McMartin had heard, is founded upon the case as there detailed. So it has been considered by the gentlemen on the other side: they make it not only the theme of high wrought praise, but the chief foundation on which they rest the claims of its author to professional eminence. It was, indeed, a remarkable case, not because of any cure of the wound, but because it was kept open, and thus afforded opportunities for making observation on the operations of the stomach. If the Doctor had ever cured the wound, (which he did not) it does not necessarily follow that he became thereby pre-eminently qualified to operate upon the head, and entitled to do so, regardless of the practice and opinions of the most eminent surgeons in Europe and Amer-

ica, who have made the study and practice of surgery the business of their lives. But he kept the hole open to gratify his curiosity—laudable, it may be—and he has published the result of his observations: and this the gentlemen imagine, has placed his claims to professional eminence beyond question, and has secured to him immortality.

It was once thought to be an arduous undertaking—a difficult, almost hopeless enterprise, “to climb the height where Fame’s proud Temple shines afar.” It required years of labor, a life of toil. A niche there was the hard earned reward of a life of untiring exertion, of ceaseless effort. Many a noble heart, many a giant intellect has been crushed in the enterprise. But if such a work as this will now immortalize its author’s name, immortality is comparatively of easy achievement. It would require no extraordinary exertion, and for that reason could be of very little value. The ancients imagined that the Temple of Fame was situated on the topmost height of a steep and lofty mountain—its approach so difficult as to make it almost inaccessible to human effort. Moderns, it would seem, have either removed it to a plain, or have discovered a back way, a sort of near cut, by which access can be had almost without exertion. We have indeed degenerated, and often mistake notoriety for fame, and I should not wonder if there be some to claim a niche in the temple, who could only obtain access through the sewer, if there be one.

To return to the book, and to the claims set up for its author, founded upon it. I have read enough of it to satisfy me. It contains facts which may be interesting to others; but I have no relish for them. I am, perhaps, incompetent to appreciate the value of the work; but it seems to me that it cannot have accomplished all that the gentlemen imagine.

What are the facts of the case, in which it is said that Dr. Beaumont exhibited such transcendant ability as a surgeon, that he is at liberty to set at naught the lessons of experience, and make experiments on the human head? We learn from this book, that a soldier had received a gun-shot wound, the ball passing through the breast, entered the stomach.

Dr. Beaumont, instead of healing up the wound, and closing the hole, adopted means to keep it open. If I understand what a cure is, he did not effect it. Had it been my case, I should have been obliged to him, if he had cured the wound, closed the hole, and left my stomach to perform its functions in secret, according to the order of nature. I should choose not to be made the subject of an experiment. The Doctor chose to indulge his curiosity, to look into the interior, and observe the process carried on there. He desired to make experiments, and was fortunate enough to find his patient willing to submit to them. I do not object to his availing himself of the opportunity; it was one that will not probably again occur in a century, and the occasion might have been made to subserve the interests of science. This book is a kind of diary of the operations of the patient's stomach, with occasional reflections by the author. Whether the discoveries made are new, or have been to any extent available in the advancement of science, I do not pretend to know; but I have never learned that the book has been very highly complimented by the profession, for any great aid it has afforded, in the improvement of surgical or medical knowledge. Nor have I before heard that it was regarded as alone sufficient to establish the claims of its author to professional eminence.

The work is now before me, and I will read to you a few extracts, from which you will form your own conclusions [here *Mr. Geyer* read parts of the book]. There, gentlemen, you have specimens of the production. You are informed how the operation of digestion is carried on, by a stomach with a hole in it. It is supplied with beef one day, mutton the next, and so on; and we are told with great precision the time occupied in the digestion of each. The result of a great many experiments is given in a condensed tabular form, at the end of the book. Referring to that, I find that boiled rice was digested in precisely one hour, and the various times occupied in digesting meats and other articles, are given no doubt with great accuracy,—though it does not say whether they were *tough* or *tender*; a material omission I

should think. I will not trouble you with reading more; if you have a taste for such matters, you will find this table very convenient. You have in a few lines, a statement of the time required to digest each article of food commonly found at our tables—by a stomach with a hole in it—and you may amuse yourselves in calculating how long it would require to perform the same operation by a stomach without a hole in it. A perusal of the book may serve to gratify a harmless curiosity, and I commend it to those who have a relish for such things. Some of the discoveries detailed may be new and interesting—others I know are neither. Among other things I find it gravely asserted in this book, that people generally eat too much! This is true, probably, but the same thing has been said before with equal confidence, and people still go on after the old fashion.

The book is doubtless very good in its way; it is a plain unpretending pamphlet, and its author probably never dreamed of its making his title to immortality. I object only to the use attempted to be made of it here. I utterly repudiate the pretence that it affords conclusive proof of pre-eminent skill in surgery. I think, however, that it does furnish some proof that its author has a passion for experiments—a curiosity to see sights, which leads him on when experience bids him forbear. That same passion, which induced him to keep open a hole in one man's stomach, to enable him to inspect its operations, prompted him also to bore holes in another's head, to make discoveries within. It is avowed that the operation was performed on Mr. Davis for the purpose of seeking something supposed to be under his skull. We have I think established, that if anything was there, likely to endanger the patient, it was either not found or not removed, and that the experiment resulted in no good and was, probably, fatal. And this little book has been resorted to, as establishing the professional skill and experience of its author beyond controversy, and entitling him to disregard experience and make experiments. It is because of the object for which it was introduced, that I have spoken of it. Whatever may be its value in other respects, I cannot but regard

it as a very slender foundation, on which to erect lofty pretensions to professional eminence.

I am now about to dismiss this most unpleasant subject. I have been compelled to speak in no complimentary terms of the professional conduct and qualifications of gentlemen, toward whom I entertain no unkind feelings. I was obliged to speak of the facts, as they appeared in the case. I was not at liberty to conjecture about, or speculate on matters not in evidence. If they could have made a better case, it was their duty and their interest to do it. I had no alternative. I was compelled to test their treatment and the evidences of their claims, by the experience and the testimony of others, as presented in this case; and I could not permit my personal respect for them, much less any consideration of self to interfere with my duty as counsel. In what I have said upon the surgical question, I presume not upon any knowledge, experience, or skill of my own; for I have none of either. But the subject appears to me to be easy of comprehension—the opinions of eminent surgeons and the reasons on which they are founded are presented in their own works, and by the medical witnesses examined here, in language so plain, distinct, and clear, that their force must be appreciated by all. Apply them to the facts in this case, and if it shall appear to you more probable, that the deceased died of the wounds inflicted by the trephine, or in consequence of unskillful constitutional treatment, or both—it is sufficient. If the weight of evidence favors the conclusion that the death was occasioned by maltreatment or neglect; it is enough for us. I do not say, and I wish it understood that I do not charge, that the attending surgeons have been guilty of any criminal misconduct, or intentional maltreatment or neglect. They do not themselves claim to be infallible; like other men they sometimes err in judgment; and this, we think, has happened in this case. We believe that a fatal error was committed by them, and contend that its consequences shall not be visited upon the accused.

(*Mr. Geyer*, then addressing the Court, said :) From indications which I observe among a portion of the jurors, I

infer, that what I have read from Dr. Beaumont's book, on digestion, has excited the sympathies of their stomachs. The *existing sympathies* indicate dinner to be the appropriate remedy; and as this is a point as convenient as any other that may occur in the course of my remarks, I suggest the propriety of adjourning.

(The Court then adjourned to 3 p. m.)

Mr. GEYER: Gentlemen of the jury—I feel that I owe you some apology, for having already occupied so much of your time in remarks, which, to an uninterested observer, may have appeared unnecessary, and I fear have been wearisome to all. Believe me, I appreciate fully the irksomeness of your situation, and the anxiety you feel to terminate your labors, after the many days you have already spent in this unusually protracted trial. Could I have done so consistently with the obligations I have assumed, I should have forbore further to tax your patience. But in the discharge of the high and solemn duty which I have undertaken, I cannot expose myself to the reproaches of my own conscience, by allowing myself, for any consideration, knowingly to neglect anything which may be of service to my client. The right of the accused to be heard by his counsel would be of little service, if they do not discharge their duty fully, or are not heard patiently. You will therefore, I trust, find in the nature of my duties and your own, my apology for claiming your further indulgence.

If it had pleased the prosecutors to define the position, to state the propositions of law and fact, on which they intend eventually to rely, I might have saved myself much labor, and spared your already greatly fatigued attention. But I cannot regard the skeleton of a case made by the counsel on yesterday, as all on which they depend; the spirit with which this prosecution has been conducted, and the note of preparation which I have observed, compels me to believe, that the counsel who is to follow me has, or thinks he has, something in reserve, which will avail the prosecution—some masked battery to be opened upon us in the conclusion, and

which policy forbids should now be exposed. We have hitherto met them successfully at every position they have assumed, and silenced or spiked all the guns they have shown. As we cannot anticipate what they have in reserve, it becomes me to examine the whole field, and be prepared to repel them at all points.

I have seen enough to know, that they will take advantage of their position, and press arguments which they will not now disclose, because they may be answered, and it is my duty to present my view of the law and the facts fully. The prosecution has been commenced, and is carried on in a spirit, which I cannot but regard as intolerant. The immolation of my client is desired, ostensibly, to vindicate the majesty of the law; it is my business to see that he is not made the victim of vengeance or retaliation. I have committed, in some measure, to my charge, the protection and defence of the liberty and character of a man, not a felon, not a vagrant or loafer, not a low fellow, as the prosecutors would have you believe—but a respectable citizen, whose only voluntary act was the result of necessity; who has intentionally violated no human law,—whose character has been, not only unscathed, but brightened by the fiery ordeal, to which it has been exposed. In such a cause, with such a client, if I should neglect any portion of my duty, for any consideration, you would be the first to pronounce my condemnation.

It appears by the testimony that the deceased and the accused had each acquired for himself, and sustained an enviable reputation in this community. They were both of mild temper, amiable manners, exemplary deportment, and of kind and peaceable disposition. With Mr. Davis I was long personally, I may say intimately acquainted, and it is but justice to his memory to say, that I concur most heartily in all that has been said of him, favorably, during the trial. I knew him as a member of this bar, and boarded a long time at the same house—had daily intercourse with him—and esteemed him for his virtues, regarding him as among the most estimable young gentlemen of my acquaintance. He

was my friend, and I would have gone as far to serve him as any other man. I deplore his untimely fate as much, if not more, than those who are loudest in their professions, and most clamorous in their public lamentations.

Of Darnes I knew but little, previous to the melancholy event now under investigation. I had a casual introduction to him last winter, and afterwards saw him on one or two occasions—not where loafers and vagabonds congregate, but among those whom I regard as the elite of the young men of the city—gentlemen who do not spend their leisure hours in the haunts of vice and dissipation; but appropriate them to the improvement of their minds in the acquisition of useful knowledge, the cultivation of virtuous principles, to prepare for active usefulness in society, and qualify themselves to appreciate their privileges, and discharge their duties as citizens of a republic. Such associations are themselves a passport to esteem and regard. Davis and Darnes were intimate friends and almost daily companions, enjoying the respect, esteem, and confidence of each other. They were members of the same literary association, often met, and always as friends. They were members of the same political party, had often acted together as such in perfect harmony; and this in these degenerate days, we know, forms a stronger bond of union than anything else, not excepting the highest qualities of which man is capable. In a word, they were personal and political friends; associating in intimate companionship, and on equal terms. Not a word of discord ever occurred, not a thought of harm ever existed in the mind of either. It required an extraordinary degree of violence to break up this happy relation, and convert them into enemies. It could only be accomplished, as it was, by the fiendish spirit of an intolerant press. And the melancholy result ought to be regarded, by the conductors of that formidable engine, as an admonition to abstain from prostituting their high vocation to the purposes of scandal and intolerance of private opinion.

The prosecutors have said that the difficulties which terminated so fatally, commenced in the publication of commu-

nications, and not in editorials. This, I shall be able to show, is an assumption not authorized by the evidence; but, if was true, I cannot perceive that there would be any essential difference in this case, or that the conductor of a press is less culpable, when he publishes a libel as a communication, than when he does it under the editorial head. In both cases a grievous private injury is inflicted, and the injured party is without adequate redress in either. The tendency of both is to corrupt and debase public morals, and disturb the peace and harmony of society. It is, I believe, an established rule among editors, so far to shield the author of a communication, that however flagitious the libel, the name of the writer will not be given up, but upon terms which require that the injured party shall either challenge him to fight a duel, or prosecute him; and when these terms are submitted to, it often happens, that the name given up belongs to a man without character or responsibility, who can neither be challenged nor prosecuted, without giving him importance, to which he is not entitled. The injured party is not allowed to publish that fact, though it would be a sufficient refutation. He must violate the law, send a challenge, and if it is accepted, he must kill or be killed; or he must go through the degrading process of a prosecution, which, if successful, affords no adequate redress for the injury. If he can discover the author without submitting to the arbitrary rule I have mentioned, he may enter the arena selected by his adversary; crimination and recrimination may follow, to the scandal of society, and finally he will, in all probability, be compelled to resort to force, to redress his accumulated wrongs.

When the libel is published editorially, the injured party and the public have one advantage; they may possibly know the author, without submitting to the arbitrary law which the conductors of the press have established for the protection of anonymous libelers; and in some cases that may be sufficient, but where it is not, (as in most cases, it is not) what remedy has the injured party? He cannot resort to

the press, for though the columns of their papers may be open to him, he is taken at great disadvantage. The libelous editor has the ink and the type at his command; it is of no importance to him, in reference to the labor or the cost, whether the type be set up in one form or another; he has to fill his paper and the patrons of the press pay for it, just as they do for any article of intelligence. He, that engages in a newspaper war with a scurrilous editor, may commence with an unsullied reputation, but even if he is successful, it will be soiled before the end of the contest. Whether therefore the libel be first published as a communication or as an editorial, the injury to private character and to public morals is the same. The conductor of the press sanctions the publication in the one case, as well as the other; and must be held equally culpable in both. The same considerations which make him legally and morally responsible in the one case, apply with equal force to the other.

That an editor or publisher of debased moral character, without personal or pecuniary responsibility, should consent to publish anonymous libels in the form of a communication, or write and publish them editorially, is easily accounted for; they can have no respect for private character who have none of their own; and the corruption of public morals is but bringing all things to their own level. But that editors who have a stake in society, with families or relations of their own—possessing themselves, good moral character—gentlemen regarding the decencies of life in their private intercourse—interested in the preservation of social order, and the purity of public morals, should so far forget what is due to themselves and to society, as to publish, editorially, or as communications, libels on the private character of citizens—would be surprising, if it were not so frequently done. How often does it happen that an editor, who in private life sustains an unexceptionable character, publishes articles in both forms, and gives them an extensive circulation, which he would not read or allow to be read to his wife or his daughters? How frequently does he throw firebrands into the

midst of society, kindling private animosities, destroying private character, and subverting social order? This strange inconsistency has occasioned much reflection; and I am not able to account for it in any other way, than by supposing that the devil, of whom they speak and write so familiarly, is not an imaginary personage, but has a real existence, and presides at the editorial desk: that the exceptionable articles, to which I have referred, are written or published under the influence of the spirit of evil—by the instigation of the devil, and the plural “*we*” is used in virtue of his royalty.

Some pains have been taken to prove that Mr. Darnes was familiar with the management of the *Argus*, was frequently almost daily, at the office, and intimately acquainted with its concerns. This was done in order to show that he must have known that Mr. Gilpin was editor; and there the gentlemen desired to stop. Unfortunately, however, for them, it happened that my client’s knowledge extended further. He was so familiar with the office, that he knew more of its management than the prosecutors were willing should be disclosed. He knew and proved, that Mr. Davis sometimes wrote editorials, and often examined others before publication. He knew something more, it seems, for when we put the question, whether there were not other occasional editors, the prosecutors became exceedingly *distressed*, and forthwith appealed to the Court to arrest the inquiry; and we were not allowed to have an answer. Mr. Darnes’ familiarity with the office, and his intimate knowledge of its affairs, shows that he was the associate of all concerned there, publisher and editors, principals and auxiliaries, and enjoyed their confidence. They were all of the same political party, co-operating in the common cause, acting as personal and political associates, and this relation continued down to the period, when the meeting was held by men of the same party, of which Dr. White was president and my client secretary. That meeting, it seems, took the unpardonable liberty of expressing an opinion on one question and one alone, adverse to the doctrines held by the *Argus* and its managers. That

press forthwith commenced a war of proscription, against all the actors in that meeting, denouncing them as "Catalines"—traitors to their country. The very men, who but the day before had been the associates, the respected companions of the managers, were reviled in no measured terms. They were treated as objects of scorn and contempt for having exercised the freeman's undoubted right, peaceably to assemble and freely express their opinions. I demand to know what right has the *Argus* or any paper, to proscribe, villify, or abuse any man or set of men, for not believing every article of the political creed of its managers? By what authority does the press arrogate to itself the right to control the political opinions of any man, or to proscribe or punish those, who assert their right to form and express their own sentiments? Shall we encourage the press in the indulgence of this fierce spirit of intolerance and persecution? If we do, the liberty of which we boast so much is valueless—our freedom of opinion, a mere mockery. The press, when conducted in a proper spirit, and confined to its legitimate sphere, is a valuable, a powerful agent in the cause of freedom; but when it deserts its post as a sentinel of liberty, and prostitutes its high privileges to private scandal, intolerance and proscription, it is a remorseless tyrant, and takes away the rights it was designed to defend. It may be a valuable servant, if it is not allowed to become a cruel master.

It is pretended that the difficulties were commenced by Darnes, and to prove it, an article published in the *Bulletin*, in May, (which had ever since slept in forgetfulness,) was resuscitated, brought here and read, after the argument had commenced. It was a communication signed 'Anti-Sardapalus,' in which it was attempted to prove, that Mr. Gilpin of the *Argus* is a lineal descendant of the renowned John Gilpin, whose name and whose unlucky trip to the country are familiar to every school boy. I know nothing in the history of the train-band captain discreditable to him or his descendants. I admit, however, that there are other matters in that production unbecoming the columns of a respectable

newspaper, and that Darnes erred greatly in assuming the responsibility of the publication; still, I apprehend, that if any one else had done it, the prosecutors would hardly undertake to maintain, that it furnished a justification for denouncing him as a vagrant and a loafer. It happens that this was not the commencement of the newspaper part of the controversy. The publication was an answer to an article signed "Sardanapalus," previously published in the *Argus*, ostensibly as a communication. This "Sardanapalus" is the first publication in the order of time; it treats of the meeting to which I have referred, and denounces those engaged in it, as "Catalines," meriting the doom of traitors. "Anti-Sardanapalus" proceeds upon the idea, that the ostensible editor of the *Argus* was the author of the article, to which it is a reply. Whether this assumption was or was not warranted by the fact, the publisher and all the editors, ostensible and occult, are responsible for giving it a place in their columns, as much so as if they had written it themselves. Darnes is not the author of "Anti-Sardanapalus"—he did not pretend that he was—he took the responsibility of the publication, and it became his by adoption—he is merely its father-in-law. If gentlemen will have it, that he shall be held responsible for it, because he carried it to the office for publication, we are agreed; but we shall insist that the rule shall work both ways. Let the same principle be carried out in regard to all other publications, and it will appear that all the editors and publishers of the *Argus*, are responsible for "Sardanapalus" and for every article, which has been read in this trial from that paper. The gentlemen wish us to believe, that the *Argus* articles are the children of nobody, or at least that nobody is responsible for them; had they allowed us, we might have shown, that they have many fathers. As it is, we shall be at no loss, adhering to their own rule, to find at least one responsible parent, for the whole of them.

"Anti-Sardanapalus," though late found, appears to be regarded as an invaluable treasure of so much consequence, that a member of the Legislature was arrested on his way,

or on the eve of his departure for the seat of government to attend to his public duties—brought here in custody to testify about it, after the arguments had commenced. It was their last card; it was brought here to make the show complete—to figure with the skull and the cane—these three making up almost the entire resources of the prosecutors. And, after all this parade, of what importance to this case is the article; how does it justify or even furnish a plausible excuse for the article in the *Argus* of the 30th May? It was objectionable, certainly, on many accounts, but it assailed Mr. Gilpin personally, and, if the gentlemen are correct, there was but one course for him to pursue. He knew, as well as any one, the terms upon which he could obtain the name of the author, or of whomsoever assumed the responsibility of authorship. They would persuade us, that he is a very Sir Lucius O'Trigger, who regards the code of honor, so called, as paramount to all laws, who delights in an opportunity of personal combat, and would rather fight than eat. How happens it, that he never inquired into the authorship? For aught we know, he is ignorant of it to this day. Do the gentlemen, who profess to be his friends, mean to say that he guessed at the author, and preferred to resort to ink-ball and types, and sought retaliation and revenge by newspaper abuse and slander? Disguise it as they will, this is the substance of their argument. They will have it that the editorials, in the *Argus* of the 30th May and 1st June, were written and published by Gilpin, in order to avenge himself on the person, whom he *guessed* to be the author of "Anti-Sardanapalus," and for no other purpose. It seems to me, however, that Mr. Gilpin either did not know who was responsible for that article, or he did not care a button about it. He never made the slightest allusion to it; or if he suspected Darnes to be responsible for it, he could not have regarded it as worthy of his notice, if he believes, what he afterwards said to be true—that Darnes was "a common street loafer and a vagabond." If he knew any thing about it, he knew that Darnes was not the author, and

if he intended to refer to it at all, he would have made his assault upon the writer, his concealed enemy.

The article in the *Argus* of the 30th May and of subsequent dates, so far from being, as is pretended, answers to, or provoked by "Anti-Sardanapalus," do not, either of them, once refer, or make the slightest allusion to it. It appears not to have been in the mind of the writer, or advisers of the *Argus* editorials—if it was even read by them, it had then, in all likelihood, been forgotten. It is now raked up to subserve a purpose, which then had never been dreamed of by any one—to furnish some apology for the use of ink-ball and type, in soiling and blackening the character of the accused. If it had been so intended at the time, he alone would have been the subject of attack. Surely it is not pretended, that all concerned in the meeting referred to in the *Argus* article of the 30th May, were parties to the publication in the *Bulletin*; yet they are all indiscriminately assailed. Darnes is not mentioned by name or distinguished from others by description. All fare alike, and for the same reason; they had promulgated an opinion at variance on one point, with the political creed of the *Argus* managers. Of this high crime all were alike guilty, and doomed to a common fate,—to be ridiculed and denounced as objects of scorn and contempt, as the tools of other men. They are made to suffer the cruel tortures of the press, as heretics, who had presumed to think for themselves. This was the first and the only offence, committed by Darnes against their high mightiness of the *Argus*, and this in excellent company. And the article of 30th May was intended to signify the displeasure of the managers; to proscribe Darnes and all his guilty associates; to immolate their characters as a warning to all who might be disposed to like heresies.

The article of May 30, I think, I have shown, must be regarded as the commencement of the difficulties between the deceased and the accused.

It is often difficult to understand what is meant by the term "Federalist," when it is used in a newspaper of the

day. At least I have found it so. I have sometimes read long and eloquent denunciations of the Federalists, and was at a loss to know who were meant, without first ascertaining, who was the favorite candidate of the paper for the presidency. The name was once honorable; it belonged originally to those who advocated the adoption of the Federal constitution. It was afterwards the name of one of the political parties, into which our countrymen were divided; it fell into disrepute, when that party fell into a hopeless minority. The old "Federalists" have ranged themselves on different sides, in the formation of new parties; and now join their associates on their respective sides in bestowing their own old name as a reproach, upon those of the opposite side. I do not understand that the term "Dunghill Federalist," in this article, was intended to apply to Darnes, or even the old Federalists now of the same party. In the *Argus* I understand the term "Federalists" to include all of the opposite party, and only them. Darnes had not joined this party, nor seceded from his own, though he dissented from them on one point. The term "Dunghill Federalists," according to the *Argus*, embraces some of the greatest and best men, the most eminent statesmen, and purest patriots that have ever adorned this or any other country. "Dunghill Federalists" form and established our Federal Constitution. Many of them fought our battles, and upheld the honor and the interests of their country. Not a few of these same "Dunghill Federalists," are now the lights and ornaments of the age. Darnes had been told that it was a disgrace to associate with such suspicious characters; he was warned against them as heretics, who would seduce him from the true faith; he was commanded to shun them as enemies of their country. He and others ventured upon one act of disobedience, and they are all denounced as "toadies" of the "Federalists." The editors of the *Argus* seem to think, that when men will not permit themselves to be used as tools by them, they must necessarily play "toady" to somebody else. They have no idea that any body but an editor has a right

to form or express opinions on political subjects. "Toady" is the term intended for Darnes and his associates; and what is there in our language better calculated to arouse his indignation than this degrading epithet, coming as it did, from the press under the control of those with whom he was on terms of the greatest intimacy and friendship? He had been taught that all "Federalists," (meaning all who did not belong to the party of which he was a member,) were aristocrats, who would scorn to associate on equal terms with a mechanic. And now he is told that he has become the "toady" of these same "Dunghill Federalists"—a mean tool—a contemptible instrument, to answer a present purpose, and then be cast aside as unworthy of further notice—that he was barely tolerated so long as he basely permitted himself to be used as a tool. Circumstanced as Darnes was, what could have been more galling, what more likely to sting him to the quick, than such contemptuous and scornful taunts? This feeling, sensitiveness to slight and contemptuous insinuation, is natural to a high minded and honorable man, who like Darnes, with little education, and none of the adventitious aids of fortune or of friends, has vindicated by his conduct, his claims to respectability, and won for himself an honorable place in that society which (according to the artificial distinctions but too common,) was above him. Cruel indeed was this attempt to deprive him of the hard earned reward of his unaided exertions, coming as it did, from those who had professed to appreciate the natural energies of his mind, and affected to respect and esteem him for his virtues; after he had won his way into society, from which his want of education and early advantages had before excluded him.

My colleagues and myself have been reprimanded by the gentleman who preceded me, (Mr. Gantt) for what he is pleased to term our "abominable and ferocious doctrines!" I shall have no difficulty in showing, I think, that while we have not made quite as lofty professions of love of order as our adversaries, we are at least as pacific in practice as they

are. And it may appear that our sentiments are not quite as warlike as theirs. I say theirs, because I suppose they agree in the sentiments and doctrines announced by Mr. Gantt; he would not, I am sure, take upon himself to urge any doctrine in which his colleague does not concur. I now take leave to inform you, how "ferocious" were my sentiments in relation to the article in the *Argus*, which I have read. One of the gentlemen who was an actor at the meeting to which it refers, consulted me in regard to the course proper for him to pursue. I advised him to take no notice of it. I regarded it as a highly reprehensible article certainly, but it was general in its terms, including all who attended the meeting, without distinction. Although I then thought that any one of them had a right to demand an explanation—to be informed whether the opprobrious epithets employed were intended to be applied to him: I did not think that he ought to take any notice of the article. My opinion then was and is, that the injured party ought, in such cases, to forbear until forbearance ceases to be a virtue, and then he ought by no means to give consequence to the libeler, by inviting him to the field—that is treating him as a gentleman, who has none of the principles of a man of honor. The caittiff deserves only chastisement, and that is all the notice, if any, that ought to be taken of him.

It seems that Mr. Gantt is of a different opinion: he thinks that the article called for hostile proceedings from each of the gentlemen included by its terms. At least he sanctions the sending a belligerent cartel by one of them. A sort of chivalric diplomacy was carried on, in which the gentleman figured as minister plenipotentiary, accredited by one of the offended parties. The correspondence was opened with a view to *honorable* satisfaction, as it is called, that is, in contemplation of a duel. If an explanation had been denied, a duel was to have been the consequence. The offended party was to have the satisfaction of an explanation, if he could get it, if not, then he was to have the *satisfaction* of killing, or being killed—all by the assistance and under the guidance

of a friend, who so ardently loves social order that he has taken the majesty of the law under his special protection. The conduct of Mr. Gantt then shows that on the 30th May, he was of opinion that Darnes had a right, and was bound to demand an explanation, and was entitled to it. And if it was refused him, it was his right and his duty to shed the blood of the offender, or his own, by way of satisfaction *according to the laws of honor!* If Mr. Gantt and his friend were right, why not Darnes and his? I cannot perceive that there is any difference between professional men and mechanics. On such occasions, their rights and duties must be the same, unless mechanics are out of the pale of the code of honor; and whether they are or not, they are entitled in common decency, to a civil answer, when they ask an explanation of a matter apparently intended to degrade them.

Among the other reasons assigned why Mr. Darnes was not entitled to a respectful answer, is, that the "*style* of his note was *abrupt*." I admit that his style is not remarkably polished, nor is his composition distinguished for grammatical accuracy. He makes no lofty pretensions to scholarship—he is a plain, unpretending mechanic, of limited education, and that almost wholly acquired since his arrival at the age of manhood, by untiring industry and a diligent application of the native energies of his mind. It was therefore not to be expected that his compositions should exhibit all the graces of style. He is a practical man, and communicates plain ideas in plain words. His note was of easy comprehension. Mr. Davis understood it, if his misguided and misleading friends did not. But it seems that Mr. Darnes spoke of Mr. Gilpin in terms by no means complimentary, and therefore, says Mr. Gantt, he was not entitled to a civil answer. Now without stopping to inquire whether his opinion of Gilpin was just or not, let it be assumed that he was wrong, and I submit that a difference of opinion between intimate friends, as to the merits of a third person, is not a just cause of quarrel, much less does it entitle either to withhold from the

other, that which is otherwise justly his due. Is the gentleman serious in pretending that the abrupt style of a note, written by one friend to another, or the expression of an unfavorable opinion of a third person, however erroneous, is a justification, or even an excuse, not only for breaking up existing relations, violently tearing asunder the bonds of union, and denying a civil answer, but also impeaching the character of the writer, and denouncing him as unworthy the notice of a gentleman?

It so happens that it never occurred to Mr. Davis to take either ground now assumed by the gentlemen who prosecute in this case, as his justification for throwing off an old friend, and doing himself the injustice to refuse a proper answer to a plain question. The article, the purport of which I have explained, was published on the morning of the 30th May, in the *Argus* newspaper, of which Mr. Davis was proprietor and publisher, and also sometimes editor. On the same day Mr. Darnes addressed to him the note, which has been read to you several times. It was not addressed to a stranger, or an enemy; but to one whom the writer regarded as a friend, and therefore it was not penned with as much care as, under different circumstances, it might have been. It was respectful in terms to Mr. Davis, plain in its language, admitting of no doubt, that the only object of the writer was to obtain the explanation which he expected from a professed friend. Although I do not agree with the adverse counsel in the expediency of this demand, Darnes had an undoubted right to make it, if he chose so to do; and a respectful answer was due to him. This he had a right to expect from anyone, and more especially from Mr. Davis, with whom he then was, and for a long time had been, on terms of the most intimate friendship. Had Mr. Davis allowed the feelings of his own heart to council him, I cannot but believe that he would have given a civil, if not a satisfactory answer; but from some cause, he appears to have listened to other councils, and refused to make any reply whatever.

In a note addressed to Mr. Grimsley, Mr. Davis gives *his*

reasons for returning Darnes' note, and refusing to communicate with him at all. Whether they are such as influenced his advisers is immaterial; they are such as he chose to give—he was competent to assign his own reasons, and we are not at liberty to impute to him any other. To this unfortunate note I now call your attention. (Mr. Geyer here read the note from Mr. Davis to Thornton Grimsley, of 30th May.) You perceive then how much at fault our adversaries are in assigning reasons for the course pursued by Mr. Davis. They disclaim those he himself gave, and assign to him others, to none of which he makes the remotest allusion. He sends back Darnes' note without an answer, not because of Darnes' agency in the publication of "*Anti-Sardanapalus*," nor the abruptness of his style, nor yet because of his opinion of Mr. Gilpin—if either of these had existed he would have said so. No! He says Darnes is not entitled to any notice from him—"from the character of the author and the contents of the letter." It is then the bad character of Darnes which, in the opinion of Mr. Davis, entitles him to no notice or reply. And was not this an aggravation of the injury? Was it not in substance an avowal of his concurrence in the article in the *Argus*? "*From the character of the author!*" What was that character in the estimation of Mr. Davis himself, previous to and until the meeting, which incurred the displeasure of the *Argus*? Were not he and Darnes intimate, personal and political friends? Did not Darnes enjoy his respect, esteem and confidence? Did he not deserve it? What is it that sunk him so low in the estimation of Mr. Davis, or rather his advisers, that he suddenly became unworthy of a civil answer to a question, he had a right to ask? "*And the contents of the letter.*" What are the contents, which, added to the character of the author, rendered it unworthy of notice? The substance is nothing more than was contained in the note carried by Mr. Gantt; its style may not have been as pure, but it was quite as plain. It is true that Darnes stated as a reason for calling on Davis, that in his opinion, the standing of the editor forbid his communicat-

ing with him. And can it be that this opinion, right or wrong, forfeited the claims of Darnes to respectability, which until then had been recognized by Davis himself. But gentlemen say, that Davis and Gilpin were *friends*, and therefore what Darnes said of Gilpin forfeited his title to Mr. Davis' respect. And pray, were not Davis and Darnes *also friends*? And did Gilpin forfeit his claim to the respect of Mr. Davis, when he assailed *his friend* Darnes in the paper? No, gentlemen, Davis did not, and would not make any such excuse as is here set up for him; he would involve himself in no such preposterous absurdity. If Mr. Davis had intended anything more than appears in his note, he would have said so in plain terms. In what he did, I do not believe that he did justice to his own feelings and character. I believe that the note was dictated by others; I can impute no such temper or disposition to him. He was the victim of bad advice; he surrendered himself too much to the influence of others, who had views of their own—and this, I think, will be made apparent by circumstances.

The counsel for the prosecution contend that Darnes ought to have addressed himself to Mr. Gilpin, and not to Mr. Davis. A publisher of a newspaper, they say, though *legally*, is not *morally* responsible for a libelous editorial; and in this doctrine they have the satisfaction of the concurring opinion of Mr. Charles F. Hendry, and no one else. Though it may be "outrageous audacity," I take the liberty, to differ with the whole of them, and dissent from their doctrine in toto. I do not recognize the distinction between *legal* and *moral* responsibility. I do not know that I precisely understand the term *moral* responsibility, as used by the gentlemen; but I take it, they mean to say, that *moral* responsibility consists in the liability to receive and accept a challenge, and fight a duel, or in submitting to a castigation, as the case may require. That a man may divide his responsibility, and respond by deputy. My opinion, however, is that responsibility is entire, and every writer and publisher of a libel incurs the whole, and the injured party may hold any or all of them

responsible, in any or all the modes, in which any remedy is allowed. No rule can be better established or of more general application, than that, he that acts by another, acts himself, and is responsible in every way for the acts of his agent, as for his own. The principle is familiar to every lawyer; it is common sense, and is generally understood, and as universally applied.

According to the English law, to which the gentlemen have manifested great partiality, if a man wilfully turns into the street, or permits to go at large a vicious animal, with propensities dangerous to life, he is so far *legally* and *morally* responsible for the acts of the animal, that if fatal consequences ensue, he will be convicted as a felon, and transported, or hanged, according to the circumstances, as if he had committed the homicide with his own hands. Will gentlemen tell us that the man incurred only a legal responsibility, and that the *beast* alone was *morally* responsible? Do they punish as felons in England those who are not *morally* responsible? If a proprietor hires an editor, prone to libel our citizens, with a natural propensity to mischief, and turns him loose to prey upon the community, himself furnishing the means, shall that proprietor escape responsibility, *legal* or *moral*? I disclaim any intention to allude to all editors, or any particular one, in the opinions I have had occasion to express, in relation to the abuses of the press. I know there are a host of high minded and honorable editors, independent and gentlemanly conductors of the press; but the licentious portion of the editors have inflicted deep wounds upon society, to the injury of public morals, and the disturbance of social order. I speak of the general principle, which it is attempted to be interposed for the protection of their employers—and I state cases to illustrate the consequences, which must follow the recognition of such a principle. Establish it in this case, and what is the consequence? If a proprietor of a press and type wishes to degrade or defame his neighbors, he has only to hire a convenient editor, and skulk from all available responsibility himself—his engagee, his

dirty instrument, scattering firebrands throughout the community. Respectable and honorable men have no occasion for the aid of any such principle, and they would all, as Davis did, scorn to invoke it.

I have said that the principle, for which I contend, is universally recognized, and I believe it never was before attempted to be controverted. Its application is made in the every day concerns of life—in the transactions between neighbor and neighbor, as well as in the administration of justice. It finds a place in every mind. I might confidently put the question to any of the ladies here, whether they do not recognize it? If a neighbor had a pestiferous little cur accustomed to mischief, and that neighbor, with a full knowledge of the propensities of the animal, should turn it loose among the flowers of any lady here, would she hold the puppy alone *morally responsible*, and content herself with having him whipped out of her garden? Would she not call in Madam, the owner, and demand that the brute should be confined or muzzled? Even the Indians on our borders understand this matter better than the gentlemen, if they are sincere in the opinions they have expressed. One of the tribes which had been in alliance with Great Britain, after the conclusion of the late war, came to St. Louis to make a treaty of peace. They had, it seems, stolen many horses from the Americans during the war. The American commissioners introduced into the treaty a stipulation for the restoration of the horses. I was present at the treaty, and I remember, that after it had been signed by all the council chiefs, a distinguished war chief was called upon to give it his sanction. He told the commissioners, that his signature would not give it any additional force; it was already binding on the nation, by the signature of the council chiefs; but as he was called upon, he would state frankly, that he did not approve it, because of the unjust and impracticable stipulation for the restoration of the horses. Fathers, said he, you know that its performance is impossible. We are poor, and cannot restore the horses. If you enforce the penalty, we have no motives to

peace—our young men cannot be restrained. It is unjust, we were but the tools of our father over the great water; what we took, was for him. You made a treaty with him, why did you not stipulate for the restoration of the horses? Why do you look to the poor Indians? When we receive an injury, we look not to the instrument. Will white men, when their property is destroyed, look alone to the tool, and not hold the hand that used it responsible?

Although I contend and think I have abundantly established, that the publisher of a newspaper is responsible for the editorials, in all ways in which an editor is responsible; yet I admit, if an article be published against the wishes or without the knowledge or consent of the publisher, he may relieve himself from what gentlemen please to call *moral* responsibility to the injured party, by frankly saying so, when he is called upon for an explanation. If then, Mr. Davis did not know of or approve the publication of the exceptionable article in the *Argus*, what had Darnes a right to expect, especially from a professed friend, when he called upon him for an explanation, but that the article would be disavowed or explained to his satisfaction? If Mr. Davis had met the application in the spirit of kindness, becoming the existing relations between them, he would have endeavored to sooth Darnes' feelings, and would not have scornfully and contemptuously refused him a reply. If the fact was so, how easy, how natural, for him to say to his old friend, "I did not write the article—Mr. Gilpin is the sole editor and alone responsible for it. I regret that he should have wounded your feelings; but the paper is exclusively under his control, and I cannot undertake to say, whether he intended to allude to you or not." If this had been done, all would again have been peace between those two amiable and respectable men. Darnes was entitled to an answer—and from his previous intimacy with Davis, ought to have received one, in which he should have been spared the infliction of a fresh injury. It particularly became Davis, a professional man, to be tender of the feelings of Mr. Darnes, who is a mechanic. He

ought to have taken special pains to exempt himself from the suspicion, that he treated him more unkindly than he would a professional man under like circumstances. Nay, he ought to have gone farther to sooth his feelings, than he would have done otherwise, in respect to that sensitiveness, which is known to exist among mechanics, to every indication of disrespect from professional gentlemen. I do not intend to say that mechanics are entitled to higher favors than other classes. For my own part, I never speak of men by classes. I judge of individuals by their actions, not by their profession or occupation. But it is true, however much it is to be regretted, that mechanics in their associations with professional men are jealous of slights. For this reason, the insult offered by Mr. Davis struck the deeper into Darnes' heart. He had been the intimate associate of Davis, and when he was refused a civil answer to a plain, authorized question, he felt that he had been barely *tolerated*, and was now cast off with scorn and contempt, as a being unworthy the notice or respect of a gentleman.

When Mr. Davis was called upon, he scorned to take the ground now assumed by the gentlemen, that as publisher, he was not morally responsible for the editorial matter of the paper. He even declined to relieve himself from the responsibility of the article referred to, when an opportunity was afforded him to do so: when he might have done it without dishonor, and ought to have done it, in justice to himself and Darnes, if indeed he was not privy to it. His not doing so is, in effect, an avowal of his responsibility for the article. He takes exception to the character of Darnes, which could only be justified (if it had been just) upon the supposition, that he would be bound to explain, or give satisfaction, to any other of the gentlemen included, whose character was unexceptional.

Mr. Davis went still further: He immediately communicated the correspondence to Mr. Gilpin, and by furnishing him with the material, he sanctioned, if he did not directly authorize, another and still more outrageous assault upon the

character of my client, of which he directly assumed the responsibility, after its appearance, with a full knowledge of the consequences. How preposterous is it then, to contend here, that Davis is not morally responsible for the editorials in question? The gentlemen, as if aware of the absurdities in which they involve themselves by setting up false excuses, which Mr. Davis has repudiated by his conduct, attempt to get rid of the difficulty by saying that he purposely assumed a false position, in order to get a fight out of Mr. Grimsley, and leave Gilpin to take care of Darnes. They avow the object to have been to bring about two duels. They speak of this object with approbation, and yet we hear them declaiming about the preservation of social order and vindicating the majesty of the laws.

Notwithstanding the deep injury inflicted on Darnes, by the contemptuous refusal to answer his reasonable request, and the direct impeachment of his character by Mr. Davis, he still hoped that by another appeal he might obtain justice from his old friend. He was at the time a worthy member of a Christian church. He was a man of peace, harboring none of the blood thirsty and vengeful spirit which the prosecutors now erroneously impute to him and to Davis. He showed by his earnest desire for reconciliation with his friend, his willingness to forget and forgive past injuries—that he cherished in his bosom a spirit which, if not altogether Christian, is deserving of at least high commendation. Mr. Gantt is of opinion that after the refusal of Mr. Davis to answer Darnes' note, accompanied as it was, by an impeachment of his character, it was out of all question to ask, or hope for an explanation or reconciliation. It may be so, according to the code of modern chivalry, about which I profess to know nothing; and that Darnes offended against propriety in the estimation of those who acknowledge the paramount obligation of that code, in allowing himself to express his desire for peace, and his anxiety to avoid the necessity of a resort to force. But in my judgment, he stands elevated and ennobled by his forbearance, and his heart felt solicitude

to avoid, if possible, an irreparable breach with his friend. Sustained by conscious integrity, in the love of peace, he says, "I will entreat him once more; he will perhaps even yet, do me justice, and afford me peaceably a balm to my wounded feelings." It was in this spirit that he wrote his second letter, late on Saturday. If the same spirit had prevailed in the councils which guided Davis, the awful catastrophe, in which my client became the involuntary agent, would have been avoided.

It was too late on Saturday for Darnes to send his second letter. He deferred it until Monday, little dreaming that a fresh assault was to be made upon him, which would cut off his last hope of peaceable redress. In the mean time, Mr. Davis had communicated with his editor, and a new and most ferocious libel was concocted. Monday morning early, the *Argus* appeared, in which Darnes is denounced as "a loafer, a vagabond, a fit subject for the vagrant act;" and abused by other vile and degrading epithets. Then, I agree, reconciliation could no longer be hoped for; to all appearance peace was impossible without dishonor. Darnes had then no alternative; he must redress his aggravated wrongs, or be exiled from all society. It is in vain to tell a man under such circumstances, that he must submit, for the sake of peace, when he can have no peace. Tell an American citizen, that when it is attempted to disgrace and dishonor him, and drive him from society, he must go in shame, and drag out a miserable existence elsewhere, and every indignant feeling of his manly bosom will be aroused, and prompt him to resistance. Strike him as Darnes has been struck, and you inflict a torture, infinitely more excruciating, than if you tear his body and break his limbs on the rack. Who shall say to him, he must endure it, while he has yet the liberty and the courage to protect and defend himself?

Before I proceed to remark further upon the article of the 1st of June, I will present some considerations, which in my mind prove conclusively, that Mr. Davis is responsible for it. He adopted, as I have shown, the article of the 30th May,

by his co-operation with Mr. Gilpin; and by the manner in which he treated Darnes—choosing rather to inflict a wanton injury, than to avoid the responsibility of the article. He communicated with Gilpin, and informed him of all that had taken place, on the 30th May. Now I do not profess to be familiar with the code of honor as now understood, but I have some recollection of what it once was; and I think I can understand what is decent and proper on such occasions. I undertake to say, that when Mr. Davis communicated his correspondence to Gilpin, it was a departure from all propriety, as it was understood when the old code of honor was in fashion. Gilpin was not, technically, the *friend* of Davis, and could not be, consistently with propriety; for he was the open enemy of Darnes. It is improper to show any such correspondence to an enemy, or even to a friend of the writer, unless it be one selected by himself. Mr. Davis could not have been ignorant of this; for the impropriety of exposing such a correspondence would readily occur to every gentleman, however uninformed he might be of the usages of chivalry on such occasions. But the correspondence was shown to Gilpin for some purpose; if it was not for the purpose of enabling him to construct a new editorial, I pray the gentlemen to tell me what was the object in thus violating the rules of propriety? They tell us that Davis' object was to fight Mr. Grimsley; then how did the exhibition of the correspondence tend to bring that about? Could that wish be expressed, in no more convenient or proper manner? Or was it intended that Mr. Gilpin should proclaim this desire for a double duel through the *Argus*? It would seem so, indeed; for among other things in the article on the 1st of June, such is the intimation, and this shows that Mr. Davis contemplated a publication of the kind, and establishes this responsibility. Finally, on the 1st of June, when that libel appeared, Mr. Davis, in conversation with Mr. Bingham, directly alluded to it, by asking him what he thought of the article in the paper of that morning. Mr. Bingham said, he thought it "*rather spicy*." Davis said, "Yes, they thought

there was no fight aboard, but they will find themselves mistaken." Here we have a distinct recognition by Mr. Davis himself of his responsibility; he knew the consequences and was prepared to meet them. If Darnes is the father, by adoption, of "Anti-Sardanapalus," Davis, by the same rule is responsible for the *Argus* editorial. I do not suppose that Davis in the beginning contemplated any serious result; but having become involved in a difficulty, he was not the man to back out, and skulk from any responsibility. The gentlemen do great injustice to his memory in inventing subterfuges for him, which he would have scorned to employ.

The character which Mr. Davis sustained, the mildness of his temper, the kindness of his heart, and his unexceptionable deportment, forbid the idea, that his acts, to which I have called your attention, were prompted by himself. The motives, objects, and purposes, imputed to him by the counsel for the prosecution, are foreign to his nature. It is due to his memory to say, that his heart would have revolted from them. It is in evidence that he consulted others; what advice they gave, it has not been in our power to prove directly; but the inference is irresistible, that he was badly advised, urged on, step by step, to further the purposes of others, and not his own. The objects here avowed are those of his advisers, not his. The gentlemen certainly did not find them in anything said or done by Davis. They must have ascertained them from other sources, probably from those, who knew better than he, what were the purposes to be accomplished. I have already shown, that the reasons assigned by counsel, for refusing to answer Darnes, and for assailing his character, are not consistent with those assigned by Davis himself—and yet they did probably exist in the minds of those who influenced his conduct. The letter to Mr. Grimsley does not accord with the sentiments or feelings of Mr. Davis. It was dictated by a less intelligent mind, a more reckless disposition, and a more cruel heart than his. If the reasons for it are such as the gentlemen here state them to be, (and *they ought to know,*) the lan-

guage of the note was certainly well calculated to conceal them from Davis, and all who were not in the secrets of those by whom it was advised or dictated. We are told that this note, and all that was done afterwards, was intended to bring about one duel between Davis and Grimsley, and another between Gilpin and Darnes. And yet the same gentlemen almost in the same breath tell us that Mr. Davis was a peaceable man, unaccustomed to the use of arms, tender of human life, by education, habit and disposition, averse to violence; and this is true—yet they would make him to have contemplated from the beginning, involving himself and some seven more as principals and accessories in the guilt of blood. Others, no doubt, had such intentions, in urging on the deceased; but he could not have contemplated any such issue. The gentlemen do great injustice to his memory in imputing to him the fiendish purposes of others: let the responsibility rest where it ought and will, on the heads of his guilty counsellors. If his body had not been mutilated as it was, one might almost expect him to rise from his grave, and repel these imputations upon his memory, by telling us how he has been made the victim of evil councils, visiting the guilt of his blood, where it ought to rest, upon his officious, reckless advisers.

Mr. Geyer read the article from the *Argus* of June 1.

Here is a cluster of epithets, of the vilest of which our language is capable, applied to the friend and associate, but recently, of the proprietor and all the editors—the equal of the best, and superior to most of them, in all that is estimable in character and conduct. “*A fellow!*” Of whom was he (the fellow,) the associate in private life, in politics or otherwise? Of Mr. Davis, and all the managers of the *Argus*—of the most respectable of the young men of the society of St. Louis. He was the associate of Mr. Davis—of the members of the Lyceum, and among them the reverend gentlemen now before me. It was an honorable fellowship, but this is not what is meant. In the vocabulary of the *Argus*, a *fellow* is a term of contempt and reproach, signi-

fyng a mean wretch—a sorry rascal; and that is the sense in which it was applied to Darnes. How far his revilers may be able to justify its use, in consequence of his ‘fellowship’ with some of them, I cannot say; but certainly there is nothing else in his character or conduct, to furnish a plausible excuse for employment of the epithet. The affectation of contempt for the character of the friend and companion of Mr. Davis, is carried out in the use of small type, (technically, lower case) in the initials of his name: obviously for the purpose of adding force to the contemptuous and libelous epithets, which precede and follow. It was intended to signify that he was not only a low fellow, but ignorant and illiterate—a fool, as well as a mean wretch—to ridicule his want of education, as well as to defame his character. What combination of words, what form of expression, better calculated to harrow up the feelings of a man like Darnes. It is equivalent to saying to him, you are an illiterate mechanic, and must not presume to associate with gentlemen, who, like ourselves, are masters of every style, high and low. We have *tolerated* you to answer our own purposes; you have presumed upon the *respectability of our* society—we now put you under the ban; we pronounce you to be a fool and a knave; we set a mark upon you, which will exclude you from the respectable associations, you are so ambitious to form.

Nor is this all—next follows a shower of epithets of the most degrading character—Darnes called “a common street loafer.” There has been some controversy about the origin of this term. I understand that it is the name of a shell fish, which lives by lying still, opening its mouth, and catching whatever comes into it; and being almost all mouth, contrives to obtain a comfortable subsistence in that way. When a man is called a loafer, I understand it to mean that he is lazy, lounging disgrace to humanity, whose home is the street, and who contrives to keep soul and body together by spunging on his fellow men. This is the obvious meaning of the term, as used by the *Argus*. Comment is

unnecessary. Darnes is next pronounced to be "a vagabond," a houseless, homeless wanderer; a straggling vagrant, illegally roaming through the country, without the means of subsistence; differing from the loafer chiefly, in that he is active, while the other is inert,—but active only in knavery. This loafer and vagabond, they say is a fit subject for "the vagrant act;" that is, to be sold at the court house door for six months, to the highest bidder, for cash in hand! He had "the *impudence* to address a note to the proprietor of the *Argus*." And who, I pray you, was the "*proprietor*," that it was insufferable *impudence*, in my client, to ask an explanation of an article in his paper, when the right of others similarly situated, to ask the same question, is fully recognized? The proprietor was undoubtedly a gentleman of high character; but in this respect my client was his acknowledged equal. Nor were his claims to respect inferior to those of any of the gentlemen, who were concerned in correspondence on the same day, about the same article. The only difference between them, so far as we can perceive, consists in the fact that Darnes is a mechanic—of limited education, making no pretensions to style, while the proprietor and editor—the principal and agent in the correspondence—were all professional gentlemen of literary accomplishments. Is it *impudence* in a mechanic, when he is assailed by a professional man, to ask an explanation? Have we indeed arrived at a period, when the conductors of a press may abuse and vilify a respectable mechanic, and presume to call it *impudence* in him, if he seeks to preserve his well earned character from reproach, for no better reason than that he earns his bread by honest industry, and does not subsist on the misfortunes or the follies of his fellow men? While I admit that the fact, that a man is a mechanic does not entitle him to higher favor than any other man of equal respectability, I hold that it is the height of arrogance, in a professional man, to denounce him as an inferior on account of his occupation. Nay, for reasons which I have stated, Mr. Darnes ought to have been treated

with more forbearance, than if he had belonged to one of the learned professions.

Not content with the epithets to which I have already adverted, the editor and publisher, in the same article, proceed to give more specimens of their vindictive feelings. They say, "The *blackguard style* in which the note was couched, and the *degraded character* of the fellow, who had put his name to it as author, rendered it necessary, of course, that it should be returned." Is it not wonderful that they should have the indiscretion to talk of the "*blackguard style*," of Darnes' note in a composition, which is of itself distinguished for low, mean and vulgar epithets? Gentlemen, compare Darnes' note with this article, and judge for yourselves, which is most in the blackguard style—contrast the "*degraded character of the fellow*," with that of any of his old and intimate associates of the *Argus*, and he will not suffer by the comparison. "None but a jackass and a paltroon," they say, "would think of calling for an explanation of an article, deemed offensive, except by making application to its known and acknowledged author." By this is meant, that the ostensible editor of a paper, and not the publisher, is responsible; and all who think otherwise are "jackasses and paltroons!" I, with many others, must be content to come within the ban of the authors of the article. I must be very much humbled, certainly, to be regarded by them as a jackass and a paltroon. Possibly if I had had the fear of their displeasure before my eyes, I might not have had the outrageous audacity to prove their assumption an absurdity. But they have not yet exhausted their abuse—in another paragraph of the same article, they say: "This *half-witted drone*, who stands at the corners, or roams about the streets without *employment*, and *without seeking it*, and without any *visible means of support*, is a fit *toady* for the little clique of Federalists, with Chambers at their head, to hiss on to the sending *threatening letters*, which they themselves do not venture to underwrite." I appeal to you, gentlemen, what is there in the

character, or conduct of Darnes, to excuse this tirade of abuse? What is there to justify the charge of sending "*threatening letters?*" We might be disposed to laugh at the alarms of the writers, if it were not that the gross falsehood and deliberate malignity of the article excites indignation at this specimen of the abuses of the press.

The article charges, in substance, that my client, the intimate friend and associate of the publishers and all the editors of the *Argus*, is a loafer, a vagabond—a fit subject for the vagrant act—a low fellow of degraded character,—a mean wretch,—an impudent, sorry rascal, an ass, and a paltroon,—a fool and a coward,—a half-witted drone, without the means or the inclination to obtain an honest livelihood—and, what in the estimation of the writers, is the most degrading of all—a *toady* for the little clique of Federalists—a mere tool, to send threatening letters, in a blackguard style. Yet gentlemen tell us that he ought to keep cool, and bear patiently his accumulated wrongs! And what is it, that produced this sudden change in the estimation in which Darnes was held by the writers? His only offense, that I have discovered, is that committed in conjunction with others of the same political party—the unpardonable sin of political heresy. He had done no wrong to the proprietor, or any of the editors of the *Argus*, and however great may have been his error, his character certainly remained unblemished.

It has been shown, I think satisfactorily, that Mr. Davis, if he was not privy to the composition and publication of the articles, on which I have animadverted, adopted them, and assumed the responsibility of both. His letter to Grimsley, independent of anything else, was an insult to Darnes sufficiently gross to authorize a resort to force. In the opinion of Mr. Gantt, it was an occasion for a duel. And the gentlemen prosecutors tell us that after all, the letter of Mr. Davis and the publications were not intended to injure Darnes, but were designed to bring about two duels,

one between Davis and Grimsley, and another between Darnes and Gilpin.

In my judgment, (and I once knew something of the rules by which gentlemen are governed on such occasions,) the course pursued, if they contemplated such a result, was altogether inadmissible. It can scarcely be proper to publish anything about a controversy, when a duel is intended to follow. The gentlemen doubtless understand the modern code of honor better than I do; besides they appear to have been made acquainted with the objects and purposes of the movers in this matter—and speak by authority. But I confess to you that I was astonished at the tone of approbation in which they speak of those purposes, and the reproach they attempt to heap upon Mr. Grimsley and my client, for not having seconded the design of their assailants by challenging them to fight. If the *peaceful* object, of which they speak, had been effected, they would evidently have been better satisfied. Do they not perceive, that when they thus speak, they expose themselves to the suspicion that, after all, they are not so disinterested and impartial in this prosecution, as they imagine, and that there is quite as much of the spirit of retaliation, as love of social order quite as great a desire of vengeance, as of a vindication of the majesty of the law in their proceedings? I have differed with the gentlemen on many of the subjects connected with this trial, and I now take occasion to express my dissent from their notions of duelling, as they appear in this case. I do it the rather, because in my youth I was myself an offender, though I soon learned to think and act more soberly, and have since, in some measure, made amends, by often interfering successfully to prevent others from falling into the same error. I am, and have long been of opinion, that there is not, and cannot be a just cause for a duel, if the cardinal rules of the code of honor, so called, be adhered to. It is the first principle of that code, that a man who is not a gentleman, is without its pale, not entitled to challenge or be challenged. It is agreed by all, that the man who will

intentionally insult a gentleman or lady, or purposely do either an injury, cannot be regarded as a man of honor. And if any one unintentionally, wounds the feelings, or inflicts an injury on another, his first duty as a gentleman, is to atone by explanation or apology; he will promptly right the unintentional injury, or he is not an honorable man; and for that reason without the pale of the code of honor. If the insult or the injury become insufferable, and must be redressed, it is neither necessary, nor becoming the injured party, to stoop to the level of the aggressor, or elevate him to his own, by inviting him to the field, to kill or be killed. If there be an offence, for which the offender deserves death, the aggrieved party need not and ought not to descend to the level of the culprit, or raise him to his own, and hazard his own life for the privilege of becoming an executioner, in open violation of every code, human and divine. The cowhide is, in such case, a far more appropriate instrument of punishment of the miscreant aggressor, than the sword, the pistol, or the rifle. An honorable man may inflict castigation, when it is merited, without descending, or giving consequence to the vile offender.

After my client had endeavored in vain to obtain an explanation, after a new and gross injury had been inflicted upon him, in the refusal to answer him, and the abuse of his character, in the letter written by Davis to Grimsley, which, according to Mr. Gantt, cut off forever all hope of reconciliation, he still sought a pacific adjustment of the difficulty. His efforts were baffled by the hasty and unwarrantable proceedings of Mr. Davis and his advisers, in resorting to the press to inflict new and more aggravated injuries. Even after the atrocious libel of the 1st of June appeared, he still hoped, and expressed an anxious wish that he might obtain justice peaceably, and spoke of an interview with his old friend, as the means. This hope he continued to cherish until he received a peremptory refusal from Mr. Davis in person. In the mean time he was goaded by taunts at every corner, from almost every person he met. His friends en-

quired whether he would patiently submit to his accumulated wrongs. His enemies indulged themselves in sneering remarks, and pointed to the article of the morning as his degradation. All (with one exception) expected him to chastise Mr. Davis. Every body, who spoke on the subject, thought that castigation was the appropriate remedy. We have heard of but one, who thought that Gilpin was the only one who deserved it; that one was Mr. Charles F. Hendry, to whom I shall make my respects presently, and shall have something to say of his notions of chivalry. It seems that Davis himself understood this matter better than Mr. Hendry, or the prosecutors either. He knew as well as any one could, how far he had an agency in the publications, and took the responsibility with a full knowledge of the consequences. He expected an attack, and had armed himself to meet it; his friends too were informed of it, and armed themselves for the occasion. During the whole of the forenoon of that day, it was generally believed, that Darnes would chastise Mr. Davis—some of his enemies suggested a doubt of his stamina; but all agreed that it was his business to right himself, after all appeals to Davis had failed. It is utterly idle now to say, that public opinion excused Mr. Davis, and pointed to Gilpin as the only aggressor. Davis did not desire to skulk from the consequences of his conduct, and public opinion did not allow him to meet them by deputy.

When the gentleman, (Mr. Gantt,) in his opening speech, was so lavish of his denunciations of my client, as a man of wicked and depraved heart, regardless of social duty, and fatally bent upon mischief, as a cruel and remorseless murderer, I could not imagine what he meant. Seeing that the trial was for involuntary manslaughter, committed in the heat of passion, I thought, perhaps, it was only a fling at the grand jury. I knew that it did not belong to the case, and that there was no evidence previously given, to furnish even an apology for it. I was afterwards informed, that the gentlemen had found a witness in the person of Mr.

Hendry, whose testimony would astonish us, and confound our client. Mr. Hendry appeared, and delivered himself of his *important testimony*, which he had not given before, although he had been examined three times; because, as he said, he did not want it to appear that he was the enemy of Darnes. His testimony for the first time delivered, I confess astonished me, but it neither alarmed nor confounded my client or his counsel. We regretted the introduction of it, more on account of the witness, than ourselves. Mr. Hendry pretty well used up his astounding testimony himself, on his cross-examination; what he left of it is scarcely worthy of consideration, yet he is deemed of such importance, that it would hardly be respectful to him, or the prosecutors, to pass him by without further notice.

That which gives to Mr. Hendry all his importance as a witness, in the estimation of the prosecutors, is his marvellous account of before untold and unheard of threats, previous to, and an expression of exultation, after the fight—all of which was shown to have been impossible, by the contrary swearing of unimpeached and unimpeachable witnesses, on each branch. But Mr. Hendry's own account of what he heard, saw and did, merits notice for its own sake. The first of his wonderfully resuscitated reminiscences, is a conversation with Darnes on Monday morning, which he says he remembered, and did not mention before the magistrate, though he was then sworn to tell the whole truth. It seems, that he went to the barber's shop, on that morning, stopping on his way to make his respects to Mr. Bayfield and family; he met Darnes at the barber's, and though they were not on the best of terms, a free conversation was carried on between them, when Darnes opened the secrets of his heart, which he had hidden from all the rest of the world. Mr. Hendry gives a long and lame account of what he thinks was said on both sides. After much circumlocution, he comes to the point, and says, that Darnes told him of his determination to make a violent and deadly assault upon Mr. Davis. This is the substance of that important inter-

view. It seems then, if Mr. Hendry's memory serves him, that Darnes, having made up his mind to perpetrate a felony, keeps it a secret from all his friends, and avails himself of the first opportunity, on meeting an old enemy, to tell him of his deadly purpose. Now, with great respect to the witness, I cannot believe this possible. If Darnes intended what is imputed to him, he could never have selected Mr. Hendry as his confidant, aside from the fact that he was his known enemy. Darnes could have done no such thing, unless it be supposed that he blustered about fighting, so as to be taken up by the magistrates, and bound to keep the peace. If I were about to give or receive a challenge, and did not want to fight, Mr. Hendry is one of the first men that I should take into my confidence; he is a great lover of the human race, and it would be hard, if he did not find some one to save me from the dreaded issue. I commend him to the favorable consideration of all gentlemen, who pretend they want to fight, when the first wish of their heart is, that some peace officer may interpose. To such he would prove a most valuable friend; because he would do them the best of service in their time of need.

The conversation at the barber's shop occurred early in the morning. Now, mark what followed according to Mr. Hendry's own account: He was alarmed at Darnes' threats—felt a deep interest in Davis, and apprehended the most fatal issue. Instead of going in search of Davis at once, and while there was yet time, he went to his own store, and there set to thinking most industriously, until about dinner time, when his laboring brain brought forth the ingenious idea, that perhaps Davis would rather dine with him than fight Darnes. He immediately seizes upon the suggestion as a capital expedient, and forthwith writes and addresses to Mr. Davis an invitation to dinner—puts it into his pocket, and takes himself to roaming about town. Like the man in the play, he goes everywhere, except to the place where he could be of service—stops to talk with every body he meets—tells them one of his stories, (and you know how long

that takes, and how edifying when told,)—never arrives at any place, but where he finds something of consequence for him to do—and finally he reaches the National Hotel, just in time to be too late. It seems never once to have occurred to him, that Davis would be likely to be at his boarding house about dinner time, especially as he knew nothing of the ingenious device to decoy him to dinner elsewhere. He ran into the Hotel, and out again in pursuit of Dr. McMartin—returns soon after—meets Darnes, who unburthens his conscience to him once more—says he is glad of what he had done, and with a profane oath (for the first time in his life) adds, that he did not care if he had killed his antagonist. Mr. Hendry, though always out of time, in other matters pertaining to this case, arrives in the nick of time, to hear Darnes make awful disclosures.

I entertain great respect for Mr. Hendry—know him to possess many excellent qualities, and among them is, his fondness for the society of the ladies, in which he with great propriety indulges. It is the best security a young man can give for his good behavior, and I respect him for it. I do not mean to charge that his singular story is fabricated by him, knowing it to be false; but he is not remarkable for self-possession, when he apprehends or hears of the probability of a personal encounter. I do not regard him particularly as a warrior, who can look upon a fight or contemplate it in expectation with composure. Though he does generally wear his whiskers on the war establishment, he is of a kind and very pacific disposition. You will remember, how his account of a long conversation between him and Darnes, in the barber's shop, dwindled into a single short sentence from each, when it is met by the testimony of the witnesses, who were present on that *important* occasion. It seems that Hendry never spoke to Darnes at all, until he had got to the door, with his hand upon it, ready to escape. He then turned and said to Darnes, "Why don't you fight Gilpin? You are afraid of *him*." "Do you take it up?" said Darnes, and instantly Mr. Hendry disappeared. It was

in summer, his whiskers had been reduced to the peace establishment, and he, no doubt, thought discretion to be the better part of valor. If Mr. Gilpin figures as Sir Lucius O'Trigger, Mr. Hendry may serve for the part of Bob Acres, for want of a better.

The account of what occurred in the barber's shop, as given by Mr. Anderson and Mr. Duncan, is consistent with the character and state of mind of both Hendry and Darnes, as well as the relations between them at the time. It is very probable that Hendry, the avowed enemy of Darnes, would take occasion to taunt him—it is perfectly consistent with his anxious care of his person, that he first should secure his retreat. It is natural that Darnes in his then state of mind, slandered and harassed as he was, should promptly silence the annoyance of an enemy; and this he had reason to know could be done by hinting to Mr. Hendry the expediency of making himself scarce. The account of what occurred after the fight, as given by Mr. Hendry, is refuted by the testimony of Major Wetmore, Mr. Simons, and others. They state that immediately after the conclusion of the fight, and before Mr. Hendry made his first appearance, Darnes went to the drug store on the opposite corner; soon after returned to the door of the hotel, and then in the presence of these witnesses expressed his extreme regret, that he had been forced to the encounter. He then went up Market street, followed by Major Wetmore, to a point far beyond the store of Dr. McMartin. None of these witnesses saw Hendry pass Darnes, or heard either speak to the other. If he passed Darnes at all, it must have been while he was at the door of the hotel, or between that and McMartin's store. If he did, he could not have spoken to him; he was probably in his usual hurry, as much confused as anybody on such an occasion, and did not stop to speak to any one. Certainly Darnes could not have made the expression imputed to him, or it must have been made in the hearing of the witnesses I have named, or some of them. If it had been, it could not have escaped them then, or been forgotten after-

wards. It was so inconsistent alike with the character of Darnes and his previous conversation, that it must have been remarked and remembered.

The *important* testimony of Mr. Hendry then, neither coheres with the other circumstances of the case, nor is consistent with the character of Darnes, or the relations between them. It is in every particular contradicted by the testimony of a number of witnesses, of unimpeached and unimpeachable character, who were sufficiently self-possessed to know what they were about. Mr. Hendry's own account of himself is somewhat extraordinary, and needs an explanation more satisfactory than any he has given. He has been sworn three times before, to tell the whole truth of his knowledge touching this case, and never before said one word about any threats uttered by Darnes before, or any declaration after, the encounter. He admits this himself, and says by way of explanation, that he did not mention the facts which he now for the first time testifies to, not because he considered them unimportant, or did not remember them, for he says they were present to his mind on all the examinations—but he purposely omitted them then, because he did not wish it to appear that he was unfriendly to Darnes. When he is asked why he stated them on this trial, he tells us that it is because of something he had heard, Captain Grimsley had said or done; or to explain why he had said, that he thought that Grimsley was going to assist Darnes. I may not be very accurate in my recollection of the words of Mr. Hendry's explanation, but I am very certain Mr. Grimsley was mentioned, in connection with the reason for stating now, what had been so long kept a secret. Surely the prosecutors will hardly rely on this important witness, to uphold them in their gratuitous imputation of a deliberate formed design to kill Davis. We, certainly, have no occasion to be alarmed or confounded by it, however much we have been astonished.

The time arrived when a meeting between Darnes and Davis seemed inevitable. Davis was prepared for it—his

friends were armed for the occasion, as well as himself. Darnes was advised also to arm—pistols were offered to him—he was warned to be prepared to defend himself against the interference of others. His reply was characteristic of his disposition to forbear to the very last, and his tenderness of human life. Though he was goaded almost to madness, and felt that he might be forced to a conflict, he said, “No, gentlemen, I want no arms—no dangerous weapon, lest in the heat of an encounter, I might use it to the destruction of life. I desire nothing but an explanation—if I cannot get it, and must use violence, I will chastise the aggressor—arms are unnecessary—if I can talk to Davis, all may yet be explained.” You perceive in this, the noble forbearance of the man, hoping and seeking a peaceable adjustment of the difficulty, long after the period when Mr. Gantt thinks forbearance ceased to be a virtue, the hope of reconciliation a folly, peace impossible, and violence inevitable.

When it became necessary to prepare for the alternative, which my client so earnestly hoped and anxiously endeavored to avoid, he went to the store of Mr. Phillips, who keeps an assortment of canes of all sizes, and with, as well as without swords. He enquired for a cane, (not a deadly weapon;) he was shown a number of all descriptions; he asked the price of several, not one of which was large, or furnished with a sword or spear—he remarked that the prices asked were higher than he could afford to give. He had not looked at, asked for, or examined any of the iron canes. A stranger both to him and Mr. Phillips, happening to be in the store, had in his hand one of the iron canes, and observed that probably it would suit him. Darnes inquired the price, and being satisfied with that, paid it, and without further examination, took the cane and left the store. This is the cane used by him in the fight, which afterwards occurred, and is the same that the prosecutors denominate “a dangerous weapon.” Mr. Phillips describes it as of the size and description of iron canes in common use, of which he had sold many. It is composed of a small

iron rod, of the same thickness throughout. The cane is shaped by a wrapping of paper, covered with thread or cat-gut, so that at the top, it is about one third or a quarter of an inch diameter, tapering downwards to a point where the rod is bare, and is about three sixteenths of an inch, or less, diameter. The head is of lead, and about three-fourths of an inch diameter.

The cane used by Darnes was not brought into court, and it was thought by the prosecutors to present an opportunity for a parade; accordingly at the close of the testimony, a witness was brought to prove, that an iron cane had been seen after the fight, at the house where Darnes and several other persons boarded. And then another cane was exhibited to the witness, who said the cane he saw, was very much of the size and appearance of that shown to him by the counsel. This testimony was introduced in order to give color to a pretence, that Darnes had purposely kept the cane used by him, out of your sight. The gentlemen thought it of so much importance to make the exhibition, that he made an apology for not having introduced it before—and a lame one it was. He said that the owner of the cane had gone to Tennessee, and did not return until the evening before. What a miserable attempt was this to make you believe, against your better knowledge, that the cane was of a description so unusual, that there was but one more like it—that the one just returned from Tennessee, and that purchased by Darnes, were all in the city: and of course that seen at the boarding house must have been the one used by Darnes, and was under his control. Did the gentlemen wish to discredit their own witness, Mr. Phillips, either as to description or number of canes sold by him? Did they expect to make you disbelieve your own eyes, when they knew you must have seen numbers of those canes in use? How ridiculous to pretend that it was necessary to wait for the return of that particular cane from Tennessee, and reserve the important visit of Dr. McMartin to the boarding house, to the last! Nor were the gentlemen more fortunate in their at-

tempt to show, that the cane seen by Dr. McMartin, belonged to Darnes. We did not prove, it is true, that it belonged to another. The gentleman took care to keep back his evidence, until all our witnesses had been discharged; when the case was closed on Tuesday, no intimation whatever was given, that any such testimony would be introduced. I do not say that it was designed to take us by surprise, when we were not, and could not be ready with rebutting testimony; but I do think it would have been more fair to have allowed us some chance of bringing in rebutting evidence.

After all, what can the gentlemen make of their reserved evidence. It appears that the cane seen at the boarding house was straight, having no appearance of ever having been bent. It is proved that Darnes went immediately after the fight, to the drug store, with the cane in his hand, very much bent. He returned to the hotel, and afterwards went thence home without it. It is certain that it was not in his hands while at the hotel, or returning home. He therefore did not carry it to his boarding house. He must have left it at the drug store, and there is no evidence that he ever saw it afterwards. He was not bound to produce it, or account for it further. He could have had no motive to conceal it; on the contrary, he had heard it described, when before the justice, by one of the most zealous of his prosecutors, as an "iron bludgeon,"—he had reason to expect that it would again be magnified into an enormous size, and it was his interest to produce the little cane, if he could. The testimony of Mr. Phillips and others, settled the dimensions of the cane so satisfactorily, that it was thought by the prosecutors imprudent to attempt to swell it into a large "iron bludgeon." The witness who performed that operation before, had the discretion not to repeat it. Darnes, if it had been in his power, had no occasion to produce the cane, to confront and confound "the bludgeon." He was equally without motive to conceal it. He had no reason to distrust the evidence of Mr. Phillips, though the prosecution

evidently did not like it. Canes of the same size and description remained in the store of Mr. Phillips; they were everywhere to be seen in the streets, and it is preposterous to suppose that he could have imagined, that anything was to be gained by keeping the cane out of view. If we could have produced it, I now say frankly, that we would not; because we do not doubt the truth of the description given by the witnesses, and we have no taste for making a show; that business has been monopolized by the prosecutors.

In order to settle the question whether the cane described by the witnesses, as the one used by Darnes, is or is not a "dangerous weapon," within the meaning of the statute, and the indictment—we must first ascertain, satisfactorily to our own minds, what the law makers intended by the term. It becomes us to define it, if we can, intelligibly. It will not do to trust ourselves upon an arbitrary interpretation; it must be sustained by reason, and bear the test of a practical application. The gentlemen, who prosecute for the state—no, not for the state, whose representatives they are not; but volunteers acting of their own will, and on their own appointment, seeking to convict and punish Darnes, in the name of the state—assume the position, that every instrument, by which death is inflicted, is "a dangerous weapon." This definition, I think, will not stand the test of examination. The term "dangerous" is intended to designate the character of the instrument, and is equally applicable, whether death ensue or not. It cannot depend upon any unusual or accidental consequence, which might result from its use—nor upon the fact that it is used in a mode not contemplated by its construction. A "dangerous weapon" is, according to my understanding of the term, an instrument of offense, which when used against a human being, in the mode designed by its construction, is likely to kill; and its character is not changed by the accidental circumstance that death did not ensue in a given case. A pistol is undoubtedly a dangerous weapon, for the reason I have given. Mr. Gantt is of opinion that it is not—he

has a contempt for a charged pistol, which, I confess, I have not. He says, it is less "dangerous" than a cane, and this with his own definition against him, as I shall presently show. I can very well imagine, that he would rather be shot than caned; but I cannot comprehend how that determines, that a cane is more likely to produce death than a pistol. If he really means to say, that a pistol charged and used upon his body, in the mode designed by its construction, would not be regarded by him as dangerous, I congratulate him on his indifference. For myself I declare sincerely, that I should not feel quite as much at ease, under similar circumstances.

Another definition of a "dangerous weapon" has been attempted by Mr. Gantt, which he undertakes to make out by Webster's Dictionary. He first favored us with the various significations of the word "dangerous;" and then turning to "weapon," he read the definitions of that word also, as given by Webster. But he read so rapidly, not stopping to select, or inform us, what particular signification of either word he intended to use, that I could not understand, what he designed to prove by that book, until he furnished us with his conclusion, which I took down in his own words. He says that a dangerous weapon is "an instrument of offense, which causes evil." The process of reasoning, by which he arrived at this conclusion, he did not condescend to furnish. Let us now see how it will stand the test of reason, and a practical application. A pistol is unquestionably an instrument of offense; when used against any person, in the mode designed by its construction, it will *cause evil*; and yet he tells us, it is not in his opinion a dangerous weapon. How then will that opinion, and his definition, stand together? I can scarcely imagine any one thing in common use, which is not a dangerous weapon, according to the definition furnished by him. A pin may cause evil, and, under some circumstances, destroy life; and yet I hope that the ladies will not be indiscriminately accused of going about with "dangerous weapons." Scis-

sors have sometimes by slight punctures, caused evil, in the shape of serious and painful wounds. It was said by one of the medical witnesses, that a wound, inflicted by scissors, has caused lock-jaw, and produced death—no slight evil, I take it. If the ladies now use scissors—I say “if,” because I have been so long out of society, that I do not know whether that useful instrument is fashionable or not—but, if it is, the ladies are liable to be suspected of being suspicious characters, and I should not wonder, if they were called upon forthwith to give recognizance to keep the peace, out of pure love of social order.

Seriously, gentlemen, if you adopt either of the definitions, given by the prosecutors, of a dangerous weapon, you annihilate all distinction between the third and fourth degrees of manslaughter, as defined in the thirteenth and nineteenth sections. To constitute the offence in either degree, the death must be inflicted by a weapon—the difference being, that if the weapon be “dangerous” within the meaning of the statute, the homicide will be manslaughter in the third degree—if not dangerous, it is reduced to the fourth degree. Now, if every instrument, by means of which death is inflicted, is necessarily a dangerous weapon, it follows, that whenever there is an involuntary killing in the heat of passion, the homicide must be manslaughter in the third degree, unless it be justifiable or excusable; and the definition of the fourth degree, in the nineteenth section, is sheer nonsense. The legislature must have intended something by the difference in the definition and punishment of the two degrees. The only distinction, as I have shown, consists in the use of the adjective “dangerous” in the thirteenth, which is purposely omitted in the nineteenth section; and this would be absurd, if the definition, insisted on by the gentlemen, is the true one. By the term “dangerous weapon,” the legislature probably intended, an instrument of the kind commonly called arms—that is, instruments of offence which, when used in the mode designed by their construction, will probably inflict death; and this interpretation alone will ex-

plain the difference between the two sections, preserving the two degrees of manslaughter distinct, and rendering the definitions consistent with common sense.

We are not without authority in support of our proposition. In England, a homicide is sometimes ruled to be murder or manslaughter, according to the nature of the instrument, by means of which the death was inflicted. In such cases, if the instrument used was a dangerous weapon, the killing is held to be murder—if not dangerous, manslaughter only. Several cases of the kind were read to you by my colleagues. I will not trouble you with reading them again. You will remember, that in all of them, as in this case, the degree of offence depended upon the nature of the instrument used; the legal interpretation of the term “dangerous weapon” was the point considered and decided. In the decisions made in these cases, we find abundant common law authority, (which our adversaries must respect,) for saying that a weapon is not dangerous in a legal sense, merely because it produces death or causes evil. I refer to the case of Rowley, as an illustration of the principle of the English decisions. Rowley’s son having fought with another boy, and been beaten, ran home to his father all bloody, and the father immediately took a cudgel, ran three-quarters of a mile, struck the other boy upon the head, and killed him at a blow. This was held to be manslaughter only, because, in the opinion of the court, the cudgel was not likely to destroy life, and therefore not a dangerous weapon in the legal acceptance of the term. In the case where the woman killed a child ten years old, with a four legged stool, and in another, where a man struck a boy on the head with a stake and fractured his skull, so that he soon after died, the homicide was adjudged to be manslaughter, upon the principle of the decision in Rowley’s case. Neither the cudgel, the stool, nor the stake, was regarded by the court, as a dangerous weapon, though each of them was used by an adult upon a child and produced death. It would seem, therefore, if these decisions are of any value, that the character of the weapon, danger-

ous or not, is not changed by any accidental consequence, which may follow its use; and the notion that every instrument that produces death or causes evil, is a dangerous weapon, is wholly inconsistent with the adjudged cases.

When Rowley's case was read by Mr. Crockett, I observed that Mr. Gantt expected to evade its force by an argument, which had suddenly occurred to him. On hearing that the boy was killed by a single blow, he said in an undertone, "Oh! at *one* blow, *not six!*" and instantly took a note of it. It occurred to me then, that he had conceived the queer idea that an instrument was dangerous in proportion to the number of blows it required to produce death, or cause evil. When he came afterwards to treat of the nature of the instrument, he argued very much after that fashion. He urged with great earnestness and becoming gravity, the fact, that several blows were struck with the cane, which, as he said, produced death, and inferred thence that it must be a dangerous weapon, as if he supposed, that the number of blows determined the character of the instrument. After the reprimand I received for smiling, in the early part of the trial, I tried my best to look solemn, while the counsel were gravely defending their queer definition of a dangerous weapon, and though their arguments were certainly amusing for their novelty, I succeeded very well until Mr. Gantt came out with his quaint idea, that an instrument, though not dangerous, if it produces death at one blow, becomes a dangerous weapon, if it requires six to effect the same result. Then it was impossible for me to maintain my gravity. It struck me as so palpably ludicrous, that I could not suppress a smile, though I knew it would expose me to a suspicion of some lurking mischief. Indeed I know of nothing that could have kept down risibility—except the application of the trephine—with that, in *skilful hands*, I might be bored into gravity under any circumstances.

Let us not bring the notion, that every instrument, which inflicts death, or causes evil, is necessarily a dangerous weapon, to the test of common sense, which after all is the

best practical guide. The substance of the proposition is, that the character of the instrument is determined by the accidental consequences of its use in a given case. This is manifestly absurd, for besides confounding different degrees of homicide, and resolving different and distinct offences into one, the same instrument would be dangerous at one time, and not at another, though in all its properties, it remains the same. Those instruments, which never have destroyed life, or caused evil, would not be dangerous, but the moment one of them inflicts a wound or causes death, all of the same kind would suddenly become, what they were not before, "dangerous weapons."

The rule of interpretation insisted on by the prosecutors, if it be received, makes all instruments of every nature and description alike, within or without the statute, according to the consequences in the given case. Thus, a bowie knife and a common pin, would neither of them be dangerous weapons, until they destroy life; but the moment either causes death, it would become so, whether it be the pin or the knife; it is the consequences, they say, of the use, and not the character or construction of the particular instrument. When the statute, under which the defendant is prosecuted, was passed, these iron canes were not dangerous weapons, and could not have been intended, by the legislature, to be included within the term, because they had not then "destroyed life or caused evil;" but by an accidental consequence, in the use of them, they all become dangerous weapons—that is to say, during the first four years of the operation of the statute, an iron cane was not within the meaning of the term "dangerous weapon," but it is now, though it and the statute are both unchanged. This, preposterous though it be, is the notion of the prosecutors in its practical application. Now, gentlemen, turn back your memory to the morning of the first of June last and previous; call to your aid your then opinions of these little canes, and you will be at no loss to solve the question without embarrassment or difficulty. If you did not then regard

them as dangerous weapons, you cannot suppose that the legislature so considered them; its members, like yourselves, are of the people, and must be understood to have intended nothing, to be included within the terms used, except what people in general regard as dangerous weapons. You have no doubt seen many of those canes in the hands of some of our most peaceable and orderly citizens; were they then regarded by you, or generally by our citizens, as dangerous weapons? I take it you must answer this interrogatory in the negative, or you impute to your neighbors, and perhaps to some of yourselves, an offence against the public peace, by going habitually armed with dangerous weapons. And is the nature of the thing changed since the first of June? Or is it a dangerous weapon only in respect to Darnes, and not so when carried by others? I hazard nothing in saying that before that day, no one ever imagined, that these canes, in such general use, were dangerous weapons. They must be regarded now, as they were before, as common walking canes—not dangerous weapons, in a legal sense.

Mr. Hendry (by the way, what I have said of him, was said in perfect good feeling toward him—he is a capital fellow, a generous, kindly disposed man,) promised to send or bring me his cane. He has not done so, however—I cannot imagine why, unless he thought that I intended to exhibit it as proof that he is a dangerous man. This is probable, because when he was giving an account of his difficulty with Darnes at the Lyceum, he appeared to apprehend, that he was suspected of not being quite as pacific as he knew himself, and was generally understood to be; and therefore took special pains to remove all doubt, by informing us that he threw down his cane; thereby signifying, that he did not design to use it upon Darnes; but whether he was preparing for a fight or a foot-race, was not stated. After that I could not expect, if I had wished, as I did not, to prove that he was a dangerous or blood-thirsty man, by an exhibition of his cane. My only object was to show, that among the most peaceable and orderly of our citizens—and he is as pacific

as any man I know—canes, as formidable as that used by Darnes, are very fashionable. For this purpose I wanted his cane. I regret that it was not brought here for another reason. It is a specimen of Mr. Hendry's taste, and as such would have been interesting to the ladies, if not to you. He need not have been, if he was, alarmed; he is a very worthy man—not disposed to hurt any body, and had much rather do a kindness, than an injury to any one. I could have no desire to impair his well deserved reputation, as a man of peace. That he made great mistakes in his testimony, is proved beyond doubt, but I do not charge, for I do not believe, that they were intentionally made. The unusual excitement, the hurried events, the melancholy fate of his friend, the confused and contradictory accounts of occurrences which usually attend such occasions, were eminently calculated to confound a man like him. I suppose, nay, I am almost certain, that in recounting the events of that unhappy day, he did not discriminate what passed under his own observation, from what he heard, then and afterwards, from other persons; but confounded them in his testimony. I account for his mistakes upon the supposition, that in turning back his memory to recollect the events of that fatal day, his mind, not the clearest at best, became unusually clouded and bewildered, in as great confusion as it was on that day. To use a significant expression of a preacher, I once heard up the country, his ideas got into a tangle.

The cane which Mr. Hendry used, though not here, was described by himself with such minute particularity, that there can be no mistake about it. It is in all respects as formidable a weapon as the sample of iron canes exhibited here. It is of the same size; but the rod is steel instead of iron—the ornaments make the chief difference, and these Mr. Hendry told us, with evident delight, were an ivory head and a silver ferrule—these doubtless improve the appearance of the cane, and as a matter of taste, it may be preferable to those which are plainer and cheaper; but the character of the instrument, as a weapon, is the same. It is

within the definition of the prosecutors, a dangerous weapon, an instrument that may produce death, or "cause evil." Perhaps that is the reason why Mr. Hendry never carries it, except on Sundays, when he goes to church, or visits the ladies, and when he attends the Lyceum. He carries it to no place, where there is any probability of a difficulty; and if he accidentally gets into one, he forthwith drops his cane, for fear he might "cause evil." He further informed us, that iron canes, precisely such as that used by Darnes, are very fashionable, and in general use among the young men of the city. Many of them possibly have not the taste, and some, like Darnes, cannot afford to purchase steel canes with ivory heads and silver ferrules. The young men generally, (Mr. Hendry says *all the dandies*,) carry their canes with them to church; and he is excellent authority on this point. He sets the fashion and they follow, though at humble distance. Now, gentlemen, what think you, are we to understand that these fashionable Sunday canes, which the young men—Mr. Hendry and all the dandies—carry to church, are "dangerous weapons?" If a stranger,—some book-making traveller for instance—were to assert that the young gentlemen of this city are in the habit of attending public worship on Sundays, armed with "dangerous weapons," it would no doubt excite your indignation, because you would naturally suppose that bowie knives, pistols, or some other deadly weapons of that nature were meant. If these little canes were mentioned, as the "dangerous weapons," you would laugh at the fellow's absurdity. And yet if these voluntary prosecutors are right, our citizens are liable to the reproach of attending church as well as going at large, armed with dangerous weapons. Suppose that on some Sunday, after service, a bevy of these same be-whiskered and be-moustachoeed exquisites, with their little iron canes, stop as usual in front of the church, to admire and be admired by the ladies, and some grave person, one of the prosecutors for instance, should volunteer an effort for the preservation of social order, and reprove them as suspicious characters, go-

ing about armed with dangerous weapons, to the great terror of the people, and against the peace and dignity of the state. Would it not provoke an irresistible burst of laughter from every one present?—except perhaps the dandies. These innocent and amiable creatures, might be struck dumb with amazement, and would probably drop their canes with becoming gravity, and make off for fear of mischief.

I will now dismiss this subject. I may have treated the proposition of the gentlemen, at times with too much levity; but it is in many of its aspects so ludicrous, that it is impossible for me to contemplate it with gravity at all times. It is so utterly untenable, that I am persuaded the prosecutors would abandon it, but that it is indispensable to their case. No modification of it, no rule consistent with law and right reason, would serve their purpose. Their proposition, indefensible as it is, was framed for this case; to abandon it would be giving up all hope of a successful prosecution. I shall not be disappointed, if it should still be urged upon you with a vehemence proportionate to the object to be obtained. For my own part, I leave it to you, with entire confidence that it is impossible for you to find, because it is against both law and reason, that the iron cane used by Darnes is, in contemplation of the statute, a dangerous weapon. Consequently he cannot be found guilty of manslaughter in the third degree. The remaining inquiry is, whether the homicide in this case be manslaughter in the fourth degree, or excusable; and this depends upon the facts immediately connected with the conflict.

Some time after the purchase of the cane by Darnes, about one o'clock of the same day, he was met at the corner opposite the National Hotel by Mr. Walker; a conversation ensued, in which, in answer to a question from the witness, Darnes said he intended to whip a man, and wished him, Walker, to remain there. We admit most freely, and Darnes so expressed himself at the time, that he expected to meet Mr. Davis, and intended to cane him, if he did not give him a satisfactory explanation. This, Mr. Gantt says, is evi-

dence of a premeditated design to kill,—an expressed intention to *come*, or obtain a peaceable explanation, he will have it, is an avowal of a deliberate intent *to kill at all events*—and this too though contradicted by the same witness, and in the teeth of all the other circumstances of the case: I shall not stop to answer further such a proposition. The gentleman then said, that Darnes at the time was “*pale and excited*,” and this, he insists, is evidence of deliberation, and proves express malice. Whence he acquired his information, I cannot possibly divine, certainly not from the witness. There have been those I know, (and I understand there was at least one in this case) who have a proneness to antedate after thoughts, who have a faculty after a serious encounter, of remembering something in the countenance of a party, indicating some bloody purpose; but Mr. Walker is not one of them—he pretends to no sight of foreseeing events, after they have happened. Mr. Gantt is the sole discoverer of both the fact and the inference.

Suppose it is true that Darnes was then “*pale and excited*,” I cannot agree that these are necessarily evidences of deliberation or malice. The causes of paleness are as various as the constitutions of men, and the emotions to which they are subject. Men, I know, grow pale from fear, anger, or any of the passions—from bodily pain, sickness or accident—in fact anything rather than *deliberation*. This is the first time I ever heard, that paleness and excitement were certain indications of deliberation and malice. I cannot avoid remarking upon this, as another among the many evidences of the disposition of these volunteer prosecutors, not only to put the most unfavorable interpretation possible upon the words and actions of my client, but to see what others cannot see and have not stated, and then force inferences, against reason, by which to heap reproaches upon him. I ask, is it fair,—is it just—is it consistent with their professions of disinterestedness and freedom from hostility to the deceased? Does it become those, who volunteer to prosecute under the influence of no other motive, than a

love of social order, and a desire to uphold the majesty of the law? If my client was indeed pale and excited, there was abundant cause for it, far different from that which has been assigned. He was agitated by feelings more consistent with his character and disposition. It is natural that such a man should be pale and excited, under the circumstances,—reviled and abused as he had been—taunted and sneered at during the whole of the morning,—earnestly desiring to avoid a painful issue, and fearing that he could not. The time had arrived when he was reluctantly compelled to take a position, which would enable him speedily to obtain peaceable redress, or leave him without any alternative but force. His mind was agitated by the deepest anxiety. Though he still had a faint hope of peaceable redress, yet when he reasoned on this point, he feared that there was nothing on which he could rest that hope, and that he would be compelled soon to redress himself, or this country could be his home no more—he must bow his head in shame, and drag out a wretched existence in another land. When he thought of Davis, as the one with whom he must probably have a conflict, he remembered him as he had been, an intimate friend and associate, a man who had enjoyed his esteem and regard, and had his unlimited confidence,—for whom he had cherished the feelings of a brother—and his heart was wrung with bitterest agony. Was it singular that he should then be pale and agitated? Every noble hearted and generous man, under like circumstances, would have been agitated by like emotions, and would have furnished the same external indications.

We now arrive at the period of the meeting between the parties. And here Mr. Gantt contrived to make a most astonishing leap from one discovery of his own to another. With surprising professional agility, at a single bound he leaped from the point, at which he found Darnes pale and agitated, over the whole of the testimony, into the middle of the fight; and then he furnished a summary account of the whole affair. His description of it is,—“Darnes struck

one blow, with the small end, and then a shower of blows with the butt end of the cane!—Davis warded off the blows with his umbrella, as well as he could, but he did not strike!” I need not ask you, gentlemen, is this a fair or candid statement of the facts as they occurred? I will prove, that it does not bear the slightest resemblance to the truth of the case. Shea, the witness who was first introduced by them, did not see the beginning—Mr. Annan, their second witness did, but he cut the throat of their case by his testimony; and, therefore, Mr. Gantt did not once directly or indirectly allude to any fact stated by him, during his speech. Shea was to have been the chief prop of the prosecution; and, probably, the speech was arranged on the assumption of the truth of the facts stated by him. Certainly he was a very convenient and accommodating witness. But the gentlemen, I think, committed a mistake, when they supposed that his was the only evidence worthy of consideration, whether opposed by that of others or not. It seems, however, that they prepared themselves upon that supposition, and the facts were arranged and settled beforehand, accordingly. In this way, probably, the account of the encounter, given by Mr. Gantt, became firmly established in his mind, and thence forced its way into his speech, in spite of the conclusive testimony to the contrary.

It is not true, that when the parties met, the first thing was a blow and then a shower of blows. They met in the middle of Market street, opposite the lower door of the National Hotel, and the first thing was a conversation, commenced, as we must infer from what occurred before, by a request made by Darnes of Davis, for an explanation of his note to Grimsley. It is the opinion of Mr. Gantt, that after that note was sent, explanation was out of the question, and every renewed attempt to obtain it was an infraction of the code of honor, and sunk Darnes deeper and deeper into disgrace and infamy. These gentlemen, who prosecute here for love of order, seem to be dissatisfied with any overture for peace, as if it had a tendency to deprive them of some antici-

pated gratification. If it be a disgrace, that he made an effort even at that late hour, as a last appeal to his recent friend and associate, to obtain justice peaceably, my client is prepared to bear it. If it be disreputable to approve and defend his course, I take that upon myself. I utterly repudiate the notion, which these gentlemen uphold, that there is no such thing as healing a breach between old friends, or that it is dishonorable to attempt it on the part of either. On the contrary, I maintain it to be the duty of both to seek reconciliaion. And it will generally be accomplished, unless it be prevented by the interference of those who delight in duels between other people.

The conversation between the parties was continued for a considerable time. It was so long and apparently so pacific, that Mr. Annan, who had anticipated a fight, when the parties met, and kept his eye constantly upon them, concluded that there would be no difficulty, and was about to proceed on his way to dinner, when he discovered the first indication of an approaching conflict. I infer from this, that the conversation did not end with a single question and answer; but that Darnes, carrying out the forbearance he had so often manifested, continued to expostulate with Davis, and earnestly endeavored to prevail on him, to do him justice. In perfect harmony with his known pacific disposition, and his generous forbearance toward his old friend, he never surrendered his hope of peace, until he obtained from Davis in person a final, peremptory refusal. Davis, by the advice of others, was placed in a position, from which, according to their false notions, it was dishonorable in him to recede. He was unaccustomed to difficulties of the kind—he took into his confidence and surrendered himself to the control of men, who urged him on step by step to accomplish ends of their own; they prevailed upon him first to cast off an old and respected friend, to insult him by refusing any answer to a proper question, to aggravate the injury, by denouncing his character, and then persuaded him that he would be dishonored and disgraced

in this community, if he apologized or complained; no matter how earnestly reconciliation was sought by the injured party, or desired by himself. There were meddling gossips too, more anxious to originate and circulate reports, calculated to provoke and maintain hostilities, than to communicate intelligence favorable to a pacific adjustment of the difficulty. If all, who interfered in this controversy, had been half as much the lovers of peace as Davis and Darnes, the kind and forbearing disposition of Darnes, and his anxiety for the restoration of friendly relations, would have been communicated to Davis, and met by him in the same amiable spirit; but most unfortunately, he was influenced by the counsels of those, who thought that they had a fair prospect of two duels of their own contrivance, which they would not give up. If he had been allowed to consult his own judgment, or obey the impulses of his own heart, all would have been well; but he was urged on by his reckless, heartless advisers, to the desperate issue, and on them must rest the guilt of his blood.

When Davis thus repelled the last overture for peace, Darnes had no alternative, but a resort to force for redress. He was compelled under a moral duress, more potent over the will than physical torture, to inflict chastisement. If, after his long forbearance, after his accumulated wrongs, he had quietly retired, without an effort to redress himself, how would he have been regarded in this community? He would have been an object of scorn and derision, shunned and despised by his former associates, contemned and avoided by every one. When a man is coerced to any act by physical duress, he is not held accountable in law or reason, because his will is not free; and what is torture of the body compared with that of the mind, as a means of forcing the will? In this country, public opinion exerts a powerful influence over the actions of all men, who are not wholly lost to virtue. It is the concentrated power of many minds, acting upon each one individually; it forces the will more readily, than any duress or torture of the body. It cannot

be disregarded, without danger of a penalty, more dreaded than loss of life—the loss of character. It is right, it should be so. It belongs to the nature of our civil institutions, and the constitution of society. The general character of every community depends on the conduct of individuals composing it. Society cannot, without reproach to itself, allow its members to disgrace themselves. All have an interest in the conduct of each. Everyone is bound for the common good, for the security of his own privileges, social and political, to aid in forming and sustaining a public sentiment, which shall make it the object of chief solicitude in all to maintain by their deportment, a character worthy of their high station as members of a community of freemen. Public opinion, thus formed and sustained, acquires a moral force over the mind as resistless, as the power of the Mississippi over matter. It is true, there have been counterfeits manufactured for special occasions; but none, except the wilfully blind, were ever cheated by them. In this case, there can be no mistake. That public sentiment required Darnes to inflict chastisement on his assailant is beyond all question. It was at the time universally so understood by all parties—society demanded it—Davis and his friends, when they resolved on their course, anticipated it as the necessary consequence. If Darnes, under these circumstances, had proved recreant to his duty to himself, he must have met the scorn and contempt of all men as his appropriate doom. He must have hung down his head in ignominy and shame, and sought a home in some other land.

Some of the witnesses say, that when the conversation ended, Darnes slapped Davis in the face, and so doubtless it seemed to them, for they were at a distance, and could not see distinctly the movement, or the direction of the hand. General Pratte, who sat at a window in the third story of the hotel, and overlooked the parties from the commencement to the end, had advantages which no other witness had. He saw distinctly what others call a slap, and describes it by a motion with his own hand—in fact it was

the only way in which it could be described intelligibly and briefly; there are no words in our language, by which he could have conveyed a description of the act, so plain as the representation he gave. According to that it was not a slap—not a blow—there was no exertion of force,—the motion of the arm was gentle—the back of the hand touched Davis' face lightly—it was evidently designed to inform him that expostulation was at an end, and that force would now be resorted to. And here I take occasion to say, that this slap (if you please to call it for the sake of brevity) is to my mind conclusive that Darnes, however obscure his origin, or defective his education, however humble his condition in other respects, is by nature a gentleman; a man of generous heart and noble principles. It was a silent but significant intimation to his adversary, that he could forbear no longer. He did not speak, for his heart was full; he felt that the contumely, which had been heaped upon him, compelled him to use force. At this moment, so harrowing to his feelings, he had the generosity and the gallantry to warn his adversary, and afford him an opportunity of defending himself. He did more; by stepping back, he exposed himself to the danger of being shot down in his tracks. If he had been the poltroon, the mean wretch, he has been represented by his persecutors and prosecutors to be, he would not thus have surrendered his advantages, and exposed his own life, without the means of successful defence. He had it in his power, if he had been so disposed, to have taken Davis at great disadvantage; but with an intuitive sense of what becomes a gentleman, with a forbearance and gallantry that stamp him one of nature's nobles, he waived his every advantage, warned his adversary to be on his guard, and allowed him time and space to take his position, and be ready for action. This *slap* was understood by Davis, as it was intended by Darnes, to mean that he had no more words, and he must now, (though he did it reluctantly) resort to blows.

It appears that the deceased availed himself of the generous warning to be ready, and of the time allowed him to

do so. Both parties stepped back, and assumed an attitude preparatory for the combat, which had then become inevitable. It is worthy of remark, that although each was armed with a deadly weapon, neither manifested any disposition at that, or any subsequent period, to use it. Those weapons had been forced upon them by their friends, but neither ever contemplated the use of them. Davis raised his umbrella with both hands, and Darnes his cane with one. Both prepared to strike. It is said that Davis raised his umbrella only to ward off the blows of Darnes—that he never struck with it at all. This is not so,—nay, it is a palpable attempt to pervert the testimony. General Pratte, who had the best opportunity of seeing the actions of both parties, says they struck their first blows simultaneously, and afterwards they struck blow for blow. Mr. Annan, a witness on the part of the prosecution, says they both of them struck at each other several times, but at his distance from them, and being himself at the time in rapid motion, he could not tell, whether any of the blows of either took effect or not. Major Wetmore, Mr. Matrass, Mr. Wilson, Mr. Billon, and several other witnesses, who were stationary and nearer to the combatants, concur in the statement of General Pratte; testifying to repeated blows by both Darnes and Davis. At one time during the combat, Mr. Billon observed that Darnes' hat had been mashed down over his eyes, by force of the blows of Davis. In short there can be no doubt, that this was a case of mutual combat, in which each party struck many blows. It commenced at the intersection of Market and Third streets, so that it was seen by persons on each of those streets, at the distance of one hundred and twenty feet. It continued, as it had commenced—Davis using his umbrella and Darnes the small end of his cane, blow for blow. In the heat of the conflict, the cane became so much bent as to be useless, and Davis obtained the advantage, pressing upon his adversary, until he gave back as far as the curb-stone, about half way between the two doors of the hotel on Market street, some twenty or thirty

feet distant from the place where the combat commenced. Here Darnes attempted to straighten his cane, but Davis continued his blows with such vigor, that he was compelled to abandon the attempt; then and not till then, he turned the butt-end, and struck with that, with one hand, as is fully proved. After several blows, thus given and returned, the umbrella was broken, a part of it fell on the pavement, Davis stepped back, and Darnes instantly ceased to strike, at that time ignorant that he had inflicted any serious injury on Davis. The moment Davis declined further combat Darnes discontinued his blows; though Davis did not forbear when he had accidentally obtained an advantage. This is a concise and, I believe, a fair statement of all the material circumstances of that combat, according to the testimony of the witnesses.

The combat was of remarkably short duration. When it commenced, three of the witnesses, Shea, Annan and Amos, were about equi-distant from the parties—about one hundred and twenty feet. All of them walked rapidly toward them, and not one of them arrived before the fight was ended. It is not surprising therefore, that there should be some discrepancy among the witnesses, in detailing the many occurrences, which happened in such rapid succession, and were crowded into so short a space of time. Those of the witnesses,—and there were several of them,—who were in rapid motion from the commencement to the end of the fight, approaching from a distance, of course had very imperfect opportunities for accurate observation. Those who were stationary occupied different positions; some would naturally see what was not seen by others, and those, who saw the same things, would state them differently in the order of time; the confusion of the moment, the interest felt by the spectators in one or both the parties, and the serious wounds discovered to have been inflicted upon one of them, would naturally have the effect to produce discrepancies in the testimony. I confess to you, that I am more surprised that there have not been greater differences, than I am at

what I have observed in this case. I do not remember a case of combat in my professional experience, where there have been so few among so many witnesses. But I have been greatly surprised to find that the prosecutors in speaking of this combat, take the statement of the very witness, who, being in rapid motion the whole time, could scarcely see anything, as a full statement of all that occurred, and reject the positive swearing of those unquestionably intelligent and credible witnesses, who were stationary and had every advantage of observation. Because Shea says, that he did not see Davis strike at all, these gentlemen assume that he never struck a blow, although a half a dozen other witnesses swear, that he commenced striking at the beginning of the fight, and continued to strike blow for blow, until his umbrella was broken. This uncandid and unfair attempt at the suppression of the truth, is in keeping with the spirit in which this prosecution is conducted, but not in harmony with the professions of the prosecutors. I believe it to be my duty and yours to countenance no such garbling of the evidence. We must receive as true the facts, which are sworn to by respectable unimpeached witnesses. What they have sworn they did see, we must believe occurred; unless we can find some stronger reason for disbelieving them, than the fact that any one or more of the other witnesses did not see the same thing.

Among the many imputations gratuitously heaped upon my client by the prosecutors, they insinuate that he took a mean advantage of Davis, by attacking him, when he was unprepared for defence. I have already adverted to some considerations, which ought to have exempted Darnes from this imputation. They say, however, that it was dastardly and mean, to make the attack, when he had such decided superiority in the weapons. Now I will inquire, whether these gentlemen suppose, that Darnes ought to have told Davis at that time, "I intend to cane you, but I will defer it until you provide yourself with weapons, in all respects like my own?" In other words, did the gentlemen expect

that it was to be a pitched battle, with all the preliminaries arranged in order, with stipulations about the dimensions and descriptions of the arms to be used? It may be so; because, that would have been a duel—a mode of adjusting difficulties in high favor with them. They say, an iron cane, like that of Darnes' is a "dangerous weapon," more so than a pistol; but they would have been perfectly satisfied, if Davis had one also, or Darnes had notified him in advance to procure one, so that they might meet on equal terms, and have a regular duel with newly discovered "dangerous weapons." Is it not preposterous? If Darnes was authorized to strike Davis at all, it was not his business to inquire how he was armed, or whether he was armed at all, much less to wait until Davis should provide himself with a cane precisely like his own. He was bound to inflict the chastisement then or never—had he declined for any such reason as these gentlemen urge, he would have been laughed at by all who heard of it, the prosecutors included. After all, the umbrella, which Davis had used with considerable effect, was not such a contemptible instrument, of offence or defence, as the gentlemen imagine. It was not a dangerous weapon within the meaning of the statute certainly; but a heavy umbrella, tied up to the staff, in the hands of a man who is self-possessed, and wishes so to use it, is formidable, both for offence and defence. If it is held in the hand well balanced, and thrust point forward with the whole force of the arm against the breast, the eye, or any part of the head, it may prove fatal. It is within the definition of the gentlemen, a dangerous weapon; for it may "produce death or cause evil"—and this is another illustration of the absurdity of their notion. It is certainly as dangerous as a cane; and, in a street fight, it is available for offence as well as defence. Davis so considered it, and therefore did not resort to his pistol—he used it with effect too, for until towards the close of the fight, he had a decided advantage.

The fact that Darnes struck with the butt end of his cane in the latter part of the fight, has been urged as evidence,

not only of a premeditated design to kill, but of excessive cruelty and brutality. Now, I agree, that if Darnes had not, at the time, been in the midst of a conflict, in the heat of blood, if he had had time to deliberate and the liberty of choice, he would be less excusable; but when we consider the time and the circumstances, under which he turned the cane, no man who cherishes in his bosom a single spark of humanity, will recognize the propriety of anyone of the shower of epithets bestowed upon my client for that act. If he had designed to use the head of the cane, he would have done it at the commencement, or in the earlier part of the conflict; but intending no serious injury, he commenced with the small end, and continued so to use it, until it became so much bent as to be useless—his adversary thus gaining the advantage followed up his blows vigorously; Darnes was driven back some twenty or thirty feet, and then attempted to straighten his cane, so that he might continue to use the small end; but his adversary would not allow him to do it—he continued to strike Darnes, mashed down his hat, and forced it over his eyes. It was in this extremity, while he was still receiving the blows of Davis, when he could not straighten his cane, that he turned the other end. There was not time or opportunity for him to think, or calculate, about what was most prudent to be done. He was then in the middle of a fierce combat, in the heat of blood, and in extreme emergency. However much he, and all of us lament the fatal consequences, it is cruel inhumanity to hold him accountable for them, as if he had been in cool blood. The English judges, who are not very liberal in making allowances for the frailties of human nature, are yet far more humane than these prosecutors. They hold this language: “It must be observed with regard to sudden rencounters, that when they are begun, the blood, previously too much heated, kindles afresh at every pass or blow; and in the tumult of passion, in which mere instinct, self-preservation, has no inconsiderable share, the voice of reason is not

heard; therefore the law in consideration of the infirmities of flesh and blood has extenuated the offence!"

Let us now compare the facts of this case with the statutory definition of excusable homicide, and I think there will be no difficulty in determining that my client is entitled to a full acquittal. By the statute—"Homicide is deemed excusable, when committed by accident or misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon sudden combat, without any undue advantage being taken, and without a dangerous weapon being used, and not done in a cruel and unusual manner." That the homicide in this case (if chargeable to my client) was committed in the heat of passion, and by accident or misfortune—that is, involuntarily or without design to effect death, is charged in the indictment, and satisfactorily shown by the evidence, and cannot now be controverted. I think it is also established, that no dangerous weapon was used. If the killing was not in a cruel and unusual manner, we have to establish only one of two other facts, to entitle my client to an acquittal. If it appear that there was sudden and sufficient provocation for the heat of passion, or that the killing was in sudden combat, without any undue advantage being taken, it will be only excusable homicide.

You will perceive by an examination of this indictment, that it is not charged, that the death was effected by means either cruel or unusual, and no other manner of death is within the scope of your enquiry, except that alleged. Nothing is more true, (I say it under the correction of the court,) than that it is essentially necessary to set forth particularly the manner of death, and the means by which it was effected; and to this the prosecution is confined. No proof of any other manner is admissible, and consequently the jury are not at liberty to find any fact not charged. The omission of an allegation that the death was effected by means cruel or unusual, is an admission that it was not, and the jury could not find against that admission on the record. Besides, the fourth degree of manslaughter does not

differ in this respect from excusable homicide; and if it must be assumed, that the killing was not by means neither cruel or unusual, in order to convict under this indictment, in the fourth degree, it must be so in every view of this case. The question of fact has been brought to your consideration, as if there was an allegation in the indictment to bring it within the enquiry; and I have no disposition to exclude it, as I might, for I can have no apprehensions of the result. The only fact, which appears to be relied on to sustain the allegation, which is made without the record, that the death of Davis was effected so far as my client is concerned, by means cruel or unusual is, the use of the head instead of the small end of the cane, in the latter part of the fight. The circumstances under which that was done, I have already stated, and I think repelled any unfavorable inference that might be drawn from it.

The "cruel and unusual manner," in the meaning of the statute, must be nothing more than even the use of a dangerous weapon, because it renders a killing, which would otherwise be manslaughter in the third, a manslaughter in the second degree, and punishable with longer imprisonment. In my opinion it implies knowledge and design—that is, that at the time of the act, the party killing knew what he was about, and designed to produce the effect, which followed. If a man in the midst of a contest, (his adversary neither disabled nor declining the fight) in the tumult of the passions, strikes, for self-preservation, the effect of his blows, however severe, are not chargeable to cruelty, specially where, as in this case, he is almost deprived of the use of his eyes, and could not know the effect of his blows. In one sense every killing of a human being may be said to be cruel; and there are few cases, in which the means are not to some extent unusual, that is, rare or unfrequent;—but, in the legal sense, it cannot be said that the means are unusual, merely because, in no other case, have the same means effected death; nor is the manner cruel, merely because of the number and severity of the wounds inflicted in combat.

The terms "cruel and unusual" have, in some cases, been considered in England, and in no case has it ever been held, that the death was so effected, where both parties were at the time in combat: they are applicable only where the slayer having his victim in his power, designedly and knowingly resorts to means of savage barbarity to inflict death by torture. The case where the keeper of a park tied a boy to a horse's tail and beat him, upon which the horse ran away and the boy was killed, is an example of means cruel and unusual. The case of the throwing a pick-pocket into a pond, where he was drowned, was held not to be a death inflicted by means cruel and unusual, there being no *apparent intention* to inflict death, the law respecting the infirmities of human nature. Other cases might be cited to show the distinction, which I have insisted upon. In a word, the cruelty meant by the statute is nothing less, than the adoption of means purposely to torture a being in the power of the slayer. I suppose, for instance, in a case of combat, where one party having the other on the ground, takes an umbrella—a stick or anything, not a dangerous weapon, and purposely puts out the eyes, or forces it through the breast, and death ensue, it might be held to be cruel and unusual; but if an instrument, whether dangerous or not, used in the heat of combat, inflicts wounds equally numerous and severe, it is not in the legal sense cruel and unusual, especially where the blows are given by a party, "in the tumult of the passions, when the voice of reason is hushed, and the blows are struck for self-preservation, without design to kill or any apparent knowledge of the consequences."

We now come to the question, was there sudden and sufficient provocation for the heat of passion? It is said that in this case, the provocation was not sudden, because it was given on Saturday and the attack was made on Monday, and we are told that however grievous the provocation, if it appears that there was an interval of reflection, or a reasonable time for the blood to have cooled, it will not avail. This, I agree, is the English rule, where the purpose

of the assault was deadly,—but it is not so even in England, where the intention was only to chastise, and the instrument used was not likely to kill, as abundantly appears, by what was held in Rowley's case and others of the like kind, already referred to. But I do not recognize the English decisions as authority for a jury in this country. They were generally made on special verdicts, giving but a meagre and imperfect statement of the circumstances. In fact, it is almost impossible to put upon paper all that is proper to be taken into consideration in such cases, by men who are disposed to regard the actions of their fellows according to the circumstances, by which they were surrounded. In the decisions referred to, which were made by the judges at their chambers, the time which elapsed between the provocation and the assault, was generally the material question; and to us who mingle with our fellow citizens, and are acquainted with their habits, manners and mode of thinking, it is almost disgusting to contemplate the cool indifference with which the time it will take a man to cool, is settled by the English judges—some supposing it will take perhaps five, others ten minutes, and so on, and then striking an average, determine the time in which a subject ought to cool, and presume that he must have become calm within that time, and condemn him to be hanged accordingly. Here you are to judge by the nature of the provocation, his condition, and the circumstances, whether he must have had intervals of reflection, and that by reflection his passions had cooled. It is a question of fact, to the belief or disbelief of which you cannot be compelled by any arbitrary rule made here or elsewhere.

It is true that the first provocation was given by the publication on Saturday, but it did not end there: It was followed up on the same day by an aggravated insult, in the refusal to give an answer to the note, and in a second assault upon the character of my client, in the note to Grimsley. It was continued by a most atrocious libel on Monday morning, and by the taunts of co-operating enemies

during the whole of that day, before the fight. What would reflection under such circumstances be likely to produce, when blow after blow was struck at his feelings and his fame? Was it likely to tranquilize, or inflame the mind, to allay or stir up a tumult of the passions? You might as well have expected Darnes to be cool, dispassionate, and tranquil, if during all that time, he had been exposed to the most excruciating torture. If during the two days and more, his flesh had been torn with pincers and his bones broken, by a slow but continued process, on the rack, he would have had as much time to cool, and his mind in all probability would have been as tranquil. Can he be expected to keep cool under the more excruciating tortures of the mind, when his character, dearer to him than life, is torn and mutilated by that fearful instrument of torture, a prostituted press? Nor was this all; there was still another provocation about the suddenness of which there can be no controversy, for it immediately preceded the first blow. This was a peremptory refusal, after all his forbearance, to afford him an explanation—that cheap reparation for all his wrongs—this was a new insult added to the many injuries he had already received. It became then a sudden quarrel—the parties fought upon the spot. And even according to the English authorities, if one man uses provoking language or behavior toward another, who thereupon strikes him, upon which a combat ensues, and death is the consequence, the provocation is regarded as sudden, and will be *sufficient*, if no dangerous weapon be used. It matters not who gave the first blow, because it is presumed that the heat of blood never cooled. “In the combat the voice of reason is not heard, and the law in condescension to the infirmities of flesh and blood, extenuates the offence.”

On the sufficiency of the provocation, as it stood when the combat commenced, I have but little to add. You will understand, better than I can express, the grievousness of its nature. My client came to this country like most of us, an adventurer, seeking to better his condition. He came

alone, without the factitious aids of friends or fortune, to work his way by his own unaided exertions. By his upright, his exemplary deportment, he had won the respect, the esteem, and confidence of the most worthy and estimable of our citizens, to whom he was but recently a stranger. He had elsewhere friends, near and dear to him,—relations, whom he loved,—a mother, who might well be proud of her son. And think you, that he was indifferent to their feelings, as well as his own? Can you suppose that he never thought of them, or that reflection on his wrongs, and the wounds they would inflict upon them, as well as himself, would mitigate or extract the poison? Would it not plant thorns on his pillow, and render his condition intolerable, to reflect that after all his industry, his perseverance, and his struggles to establish a character for himself, of which all, who are near and dear to him, might justly be proud, they should learn that he had been denounced here as a common loafer, and a vagabond, a fit subject for the vagrant act? When under all this load of insult, he still sought for peace, new insults and new injuries were heaped upon him. If he had tamely submitted, he would have proved himself to be the mean wretch, the coward caitiff, and all the other vile things he had been represented to be. How can it be pretended that his heat of passion had no sufficient provocation?

If you are satisfied, as I think you ought to be, that there was sudden and sufficient provocation for the heat of passion, an acquittal is the necessary consequence; but as I cannot anticipate your determination upon this branch of the case, I will proceed to consider another. Whether there was sudden and sufficient provocation or not, the homicide is deemed by our law excusable, if committed in the heat of passion, without a design to effect death, upon sudden combat, without any undue advantage being taken, and without a dangerous weapon being used, and not done in a cruel and unusual manner. All the other constituents of excusable homicide, according to this definition, have been proved to exist in this case, leaving only the inquiry whether

it was done "*upon sudden combat, without any undue advantage being taken.*" It needs no argument to prove that every act chargeable upon my client was done in sudden combat; you have, therefore, only to inquire whether he took any undue advantage. This has been considered; and if I understand what is meant by undue advantage, none was taken in this case. What is an undue advantage? Is it taking the other party by surprise?—coming up behind him, and inflicting a blow without warning? I have known one instance, in which that was done, but nothing of the kind happened in this case. Darnes came up to his adversary face to face, expostulated with him for some time, and when that failed, generously warned him to be on his guard, stepped back, and waited until he had his position and the means of resistance, and was ready to strike—then, and not till then, did my client strike a blow. Let it not be said, that the weapons were unequal, therefore there was undue advantage. Davis saw the cane in the hand of Darnes, and if he had thought it dangerous, he had a pistol in his pocket, and was allowed an opportunity to use it—the choice was his own. If Darnes had sought an advantage, would he have warned his adversary, and exposed himself to a pistol shot, when he was not in striking distance with any weapon he had? Did he afterwards, during the combat, take any undue advantage? The circumstances I have already detailed, and they show, that he was so far from seeking or taking advantage, that he never even attempted to turn the cane, until he was driven to it by the vigor of his adversary's blows; and when he had disarmed him, and was yet ignorant of having in any way injured him, he at once ceased to strike. He struck only in the heat of blood, while his adversary continued his blows. If he had desired to take any advantage, he might have done so, when the umbrella was broken—it was not even known to any of the bystanders, that Davis was hurt, and could not have been known to Darnes—then he might have followed up his blows; but as soon as Davis gave the first intimation, that

he declined further combat, he desisted, although under the circumstances, he might well suppose, that he would be shot down where he stood.

I conclude then, gentlemen, that by the law of this state, if the death of Davis is chargeable at all on my client, it is excusable homicide. He is not entirely blameless, but not subject to any degrading punishment. This government instituted by and for the people, desires not to exact forfeitures, nor to disfranchise and exclude from society any of its members. The law in this country regards man, as he is—it erects no ideal standard of perfection; it prescribes no rigors against the unfortunate; it entertains no feelings of vengeance, and desires no victims; it respects the frailties and infirmities of human nature; it accommodates itself to the spirit of our institutions, the condition, habits, and manners of our people; it excuses where it can, and punishes only where it must, for the common security of all.

The prosecutors, who urge the conviction and punishment of Darnes, claim to be the representatives of the State! And who is the State, whose feelings and wishes are to be carried out in this prosecution? I know that it has been the fashion of late, to fancy the State to be embodied in some one of its functionaries; it is no common thing for one of these to imagine that he is the State, and that his private feelings and wishes are those of the State. Need I tell the gentlemen that the State is not the governor, nor the legislature, nor the judiciary, not any or all of these, much less is it any one or more, under whom they derive their authority, or whose feelings and wishes they represent. The State is the people of Missouri—you and I and all here present are among its constituent members. Do these gentlemen truly represent the wishes of the State, when they demand the conviction and punishment of my client? Do the people of Missouri desire to take one of themselves, whose character is as unblemished, as that of any of them, brand him as a felon, and make him the companion and the equal of convicted thieves and malefactors? Can they so

far belie their characters, and disown their sentiments, as to wish that a man whose upright deportment, spotless fame, and honorable bearing challenges their admiration, and entitles him to rank among the best of our citizens and enjoy the privileges of a freeman, shall be condemned to an ignominious punishment, to herd with felons in the penitentiary, because, when goaded almost to madness by insult after insult, followed up by ceaseless taunts, and new and aggravated injuries, he sought redress in the only way, in which it could be obtained, and would have been consigned to infamy if he had not? No, Sirs. If the people were here assembled, sitting in judgment, they would rebuke the pretence, that they desire conviction, by a prompt interposition of their voice in behalf of my client. It would be better that he should not live to hear a verdict of conviction, so much at war with the feelings and wishes of our people; better for himself and for the whole community, than that society should be dishonored by an act of such cruel injustice, to one of its most worthy members.

Some there are, I know, who desire the conviction of my client, and are anxious for his condemnation to ignominious punishment, but they are comparatively few in number, and are by no means distinguished for their love of social order, or a desire to uphold the majesty of the law. They would, in all probability, be prompt to redress their own wrongs, real or imaginary, by violence, whether they were justified by public opinion or not. If they should fail to do so, it would not be because of any extraordinary respect for law or order; for they are the very men, and their adherents, who were anxious from the beginning of this controversy to involve others in duels, and now seek to avenge their disappointment, by the persecution of a man, whose qualities of head and heart, render him, in all respects, their superior. Gentlemen ought not to mistake their voice for that of the State. The great body of the people can entertain none of their passions and prejudices, and will not second their efforts in this case. It is a part of the early education of

this people, to preserve inviolate the sanctity of their character, as well as their persons. They are taught in their boyhood, as one of their earliest and most important lessons, never to suffer themselves to be dishonored, by allowing a slander on their character to pass with impunity, or receiving a blow without returning it. A feeling of self-respect and self-dependence is early implanted; it strengthens with their growth, and is cherished through life. It pervades society everywhere, and is found among those who inhabit the cabin on the frontier, as well as among the residents of towns and cities. Go among the people of the interior. Inquire of an independent freeman anywhere, whether his house be in the heart of the state or on the frontier, what he would do, if the editor of some neighboring village newspaper should assail his reputation, by accusing him of crime, or any disreputable conduct. He would probably not believe such an outrage possible, but if he did, he would answer, indignantly, "I would whip the scoundrel." Aye, and if he was so slandered, he would do it promptly, without asking leave of anyone. Tell him, that if a combat ensue, and he should happen accidentally to kill his adversary, he would be condemned to the penitentiary, to become the associate of felons for years, and then to drag out a miserable existence in ignominy and shame; his manly bosom would swell with indignation, while he would tell you that such a law may suit slaves, but it is not adapted to the condition, the habits, or the feelings of freemen, and could have no force in Missouri, where no honest jury of the country could be found to execute it. Many of them, it is true, are not familiar with the artificial rules, by which refined society, so called, professes to be governed; some of them have little or no education, but they are noble by nature. Governed by principle, they need no artificial code, to teach them their duty to themselves, or their fellows. They do not exact from others, what they do not regard as among their own duties. They will defend their character, as well as their persons, and will never condemn any

man or doing that which they regard as his duty, and would feel themselves bound to do, under like circumstances. This is the prevailing sentiment everywhere among the people of Missouri. Could they be made acquainted with the facts of this case, they would be far from condemning Darnes. They would, as I do from my soul, pity those who desire to send him to the penitentiary, for resenting repeated insults, and attempting to redress accumulated wrongs, otherwise remediless; but they could not approve the spirit of this prosecution, which argues a bad heart.

There are many, no doubt, who do not concur in the prevailing sentiment of our people, which authorizes, and in some cases commands, a forcible redress of private grievances. They would, if they could, reform public opinion in this respect, and give it a different direction; but they know that this cannot be done until man changes his nature, or until society shall afford competent protection to its members, or give adequate redress for the most grievous injury, that can be afflicted. They counsel forbearance, and would, if they could, encourage and sustain those who endeavor to live down calumny, without seeking redress of any kind, but they know that there are comparatively very few whose condition in life enables them to disregard injuries of that description. They may lament that man is not as he should be; but they do not undertake to proscribe and consign him to infamy, because of his frailties and infirmities. They are aware that public opinion, whether they approve it or not, gives law to society, and few there are who can disobey it with impunity. They are not disposed to persecute those who obey its mandates, much less are they inclined to visit ignominious punishment upon the unfortunate. They desire that their opinions should be universally adopted and sustained in practice, but they do not wish or hope to propagate them by victimizing those who yield to the force of existing public opinion. They must and do regard man as he is, and judge of his conduct by the circumstances which they know exert a controlling influence over him. They cannot,

consistently with their own characters, or the benign spirit, which prompts their desire to improve the moral condition of man, wish to see any one consigned to hopeless infamy. The prosecution does not represent their feelings or wishes; it has none of the spirit of benevolence and good will to man, which influence their opinions and govern their conduct.

Do not suffer yourselves to be deceived then, gentlemen. This prosecution is not prompted by the interests of the state, nor does it represent the feelings or wishes of our people. It is not favored by the opinions or the principles of any of those, who are the sincere lovers of order; it is not intended solely to vindicate the majesty of the law. Do you imagine that if Davis had slain Darnes, these gentlemen would have volunteered to prosecute him? Think you that their disinterested love of social order, and their desire to vindicate the majesty of the law, would have prompted them to the same untiring efforts to secure conviction? If their doctrines are true, he would have been guilty of manslaughter at least, and if you are bound to convict in this case, you would be bound to a conviction in the case I have supposed. Nay, the gentlemen put this beyond dispute, by reprimanding my colleague, as holding a doctrine ferocious and abominable, when he said, that if Davis had killed Darnes, he would have been excusable! I need not say that I concur with my colleague, and in the case supposed would have regarded Davis as entitled to an acquittal. The prosecutors say they are of a different opinion; but can any one believe that they would volunteer to prosecute in such a case? Davis was a man of amiable qualities, and estimable conduct, and if the conviction of Darnes would reanimate the dead, and restore him to life, it would afford some apology for the prosecution, but nothing can effect this. Darnes is not less amiable or estimable, and if he had fallen, would his fate have been a cause of mourning or of triumph think you to those, who now seek to punish him? The case is reversed, and now they think themselves entitled to blood

for blood. Be it your care to see that law is not made an engine of private resentment or revenge. In seeming to demand justice, they may be seeking only retaliation.

Gentlemen, I am about to commit my client to your charge. I have occupied most of your time, in presenting my views of the many points appertaining to the case, and have wearied you, and exhausted myself. I had undertaken a high and solemn duty, unpleasant in many respects, and arduous in all. I came to it laboring under much physical debility, occasioned by a recent indisposition, and I have been compelled to tax my powers of endurance to the uttermost. But regarding the solemn obligations I had assumed, I was ready to expend all my remaining strength, if necessary, in the faithful and fearless discharge of duty to my most abused but estimable client, regardless of all personal consequences. I have reason to anticipate, I know from experience of the past, that I shall suffer much in consequence of my effort of to-day—but I never did, and could not in this case, allow myself, to neglect my duty as an advocate, while I was able to maintain my place, no matter how serious the consequences. I have discharged it, feebly it may be, but to the best of my ability. You have now to perform yours; less arduous, but far more important to the public, than mine. The case is one involving interests of the first magnitude, and your deliberations are attended with a corresponding responsibility. You owe it to yourselves, and to your country, diligently to investigate the facts, to settle for yourselves the principles of law understandingly, and to form conclusions, conscientiously and impartially.

When the fate of a man of amiable qualities, and estimable character (such as my client has been proved to be) is involved; when the question is presented singly, whether such a man shall be allowed to maintain his place in society, so honorably earned, and enjoy the high privileges of a free-man, which he so abundantly merits, or shall be doomed to ignominy and disgrace, to become the associate of malefactors—it is of itself sufficient to awaken the most anxious

solicitude, and demands of all concerned, the most untiring diligence, the most faithful and earnest search after truth. Important as this case is on that account alone, there are other considerations, of more than equal magnitude, affecting the interest and happiness of every member of the community, involved in this trial. You are to determine how far a licentious press, may exert its usurped power over the private character of our people; how far it may with impunity invade the peace of families, defame the reputation of our citizens, corrupt public morals, and disturb the peace and harmony of society. The characters of our public men are already scarcely worth anything. It is the daily business of a party press, to defame and revile them. Confidence in their private and public virtue is destroyed, to a great extent, and the national character suffers in the estimation of the rest of the world. A prostituted press extends its usurped jurisdiction, not only over the private opinions, business and affairs of men, and assails them with its fiendish spirit of intolerance and abuse, but intrudes into families and with remorseless cruelty, attacks defenceless members, holds up to the public gaze, the character and conduct of the other sex in false and defamatory libels. Public opinion may restrain it, but it can only act effectively, when it is faithfully represented by the verdict of a jury, in a case like the present. Law, for the reasons I have stated, is powerless. Though it may be the interest of lawyers to have it otherwise, if they will speak frankly, they will tell you, that a civil action or a criminal prosecution is worse than useless. You have it now in your power to rebuke the licentiousness of the press, by your verdict. An acquittal will be a fair representation of public opinion, on that important question; it will serve as an admonition to all profligate editors, and will improve the general character of the press. On the other hand, a verdict of conviction would serve as a new license, and an encouragement to new aggression. If there are few or none of the most profligate among us now, let it but be announced, that they are free

to perpetrate mischief in Missouri, and we shall not be long without a sufficient number, to poison the moral atmosphere of society; and make its members the victims of an unprincipled and tyrannical press.

I shall await your decision on this great and momentous question with anxious solicitude; not because I feel any great personal interest in the issue—for the time yet remains to me, I hope to be able to take care of myself—but I have sons, who are destined I hope to be actors among this people, and I feel a deep solicitude on their account. An honest name and an education, perhaps, will be their only inheritance. It gives me but little concern that they will enter life without the adventitious aid of fortune; with prudence, integrity, and industry, they will, I hope, acquire a competency for themselves, and may become respected and useful members of society; but above all, they may be contented and happy, whatever may be their condition in other respects, if they are not borne down by a system, which affords them no protection or defence against the most grievous of all injuries—condemns them to punishment, if they redress themselves, and consigns them to infamy, if they do not. You, gentlemen, will appreciate my anxious solicitude for some assurance, that their only possessions shall not be rendered useless to them, through the unbridled license of a prostituted press. In the language of a charge of an eminent judge—"You may have sons, you must have friends and relatives yourselves, and I will ask of your own consciences and hearts, whether the pride and infirmity of human nature might not lead you to wish, that these would rather violate the law, than endure the scorn and contumely of (heaven knows) an unsparing world, or incur the slightest stain or blemish on their honor."

You owe it to yourselves, as well as to your countrymen, not to establish a precedent that is to afford impunity to the aggressor, and punish only the injured party. Depend upon it, the free citizens of this republic will not submit to be degraded or dishonored, and you would not advance

the cause of social order by a verdict of conviction. While you would impair individual rights, you would encourage aggression and multiply the occasions for redress by violence. Even if you could succeed, as you cannot, in compelling our people to bow in slavish submission to the tyranny of a licentious press, what would our institutions be worth? Where would be the spirit or the motive to defend and support them? A verdict of conviction in this case, would furnish a striking example of the destructive consequences which would follow the establishment of the principle it would assert. My client is poor, and though wealth is not without its influence, happily in this country distinctions on that account are rarely made. He is the architect of his own fortune—he has made himself, a respected and worthy member of society by his own unaided exertions. If you punish him for doing that which public sentiment commanded, you inflict a wound on society through one of its most worthy members, who ought to be cherished and sustained. You would discourage all effort to earn and maintain a reputation above reproach, by condemning a man of estimable character, to be the equal and the companion of felons. You would deprive one of your most estimable citizens of a country and a home—for he can have no country, no home, when he is consigned to punishment—if he obeys the first law of his nature, as well as the irresistible law of public opinion, and is condemned to ignominy and shame, if he proves recreant, and fails to vindicate his fame, when it is assailed. What will be the value of reputation in a country, where it is not and cannot be, protected by law, and may not be vindicated by the only effectual means existing? What incentive have our young men to earn and support a respectable character, what inducement to struggle against, and overcome adverse circumstances, to obtain a place in society, if after all it is valueless? If you degrade the man, and give importance only to the animal—if the high souled principles, which distinguish freemen are to be frowned down, and nothing

tolerated but mere animal instinct—if the body is to be made the chief care, and life the only thing of value—what motive can any man have, to expose that body, and hazard that life, to maintain the rights, defend the institutions, or vindicate the honor of the country? Any country and any form of government would be equally valueless to those, who have no rights, or dare not defend them.

Trusting to your sense of duty to yourselves, and to your countrymen, and to the high feelings which animate your bosoms, and are cherished by all freemen, I now confidently commit my client and his fate to your charge—asking only, that in what you have yet to do, you will go to work, as I have done, earnestly, patiently, faithfully, devoting yourselves to the discharge of your high and sacred duty, regardless of all minor considerations. Let your verdict be the result of a diligent and impartial investigation, according to the dictates of an enlightened and unbiased judgment; that you may secure to yourselves, in all time to come, whenever you reflect on the events of this trial, the approbation of your own consciences.

MR. ENGLE'S CLOSING ADDRESS.

November 13.

Mr. Engle said that he and *Mr. Gantt* were properly employed by the Circuit Attorney to conduct the prosecution.

Mr. Geyer, with bitterness, and with a tongue dipped in gall, assailed us in a manner which no zeal for his client could justify, and which went far beyond the bounds of raillery and sarcasm, so usual among members of the bar. That gentleman, as he boasted to you more than once, has been known in this community for more than 25 years, and enjoys an unrivalled reputation for forensic ability in this state. I have heard of his fame (and I do not wish to flatter,) before I became a citizen of Missouri. I have heard his praises sounded particularly as a great criminal lawyer, accompanied with remarks that he was able at any time to

procure the acquittal of any offender, no matter how high may have been the grade of his crime, if he only was able to pay him well for it; and that with a thousand dollars in his pocket, wherewith to retain this distinguished advocate, a man could perpetrate any crime which his malice, revenge, or any other passion might suggest, with perfect impunity; for it is said the force of this gentleman's genius can bear down the court, the jury, the law and the evidence. This in fact amounts to a revival of one of the monstrous abuses of religion in the middle ages, by which indulgences to commit crime were regularly sold for money. This reputation places the gentleman, I admit, on a lofty eminence, from which he can look down upon us; though he and his colleague are mistaken if they suppose that we had not correctly appreciated and measured the disparity of force between them and us; that they were giants and we pigmies in comparison. We knew perfectly well that we came into this case comparatively strangers; that our social position, weight of character, and legal reputation, would but illy contrast with theirs; that we were at best performing an ungracious task, and that the crowds of admiring listeners who came here to laugh at the jokes and *bon mots* of the facetious counsel, and to testify their applause at his sarcasms, whether directed at the witnesses or counsel, by stamping of feet and clapping of hands, would be wanting in any such marks of approbation towards us. 'I confess I but little admire these theatrical tricks and displays in a court-house, these attempts to insult and mock justice even in her own temple; and I sincerely hope that not a single individual present will mortify me so much, as to testify even in the slightest manner, their assent or dissent to the sentiments which I may utter. Occupying the position which these two learned gentlemen do, I deem it to have been a very useless waste of power to have occupied so much of their time with us, and I think in their endeavor to crush and cover with odium and ridicule two junior members of the bar, whose names stand nearly at the foot of the roll,

they were wanting in that magnanimity and liberality of feeling which *great men* sometimes possess.

He then discussed the question, Did Darnes kill Davis with a dangerous weapon? and resented the attack upon Dr. Beaumont.

Mr. Geyer made an attack upon the professional standing of Dr. Beaumont, which he kept up for half an hour. The attack was systematic, had been conned over in the office; a book of which Dr. Beaumont was the author was brought into Court, for the purpose of affording a subject for ridicule; and the whole language applied to him was coarse and offensive in its character, the worst specimens of burlesque and raillery. "Who ever heard of this book," exclaimed Mr. Geyer, "upon which alone Dr. Beaumont's surgical fame rests?" "Where has it been reviewed, by whom noticed, and what is it?" Now, I do not pretend to say, but on the contrary, I especially deny, that Dr. Beaumont's reputation as a surgeon of skill and experience, rests entirely upon this book; but I can inform the querist, that that book, and the extraordinary surgical case, and the subsequent experiments which it details, ought not to be sneered at, even by an advocate so distinguished as himself. I hold in my hands a reprint of that same book, made in Leipsic, in the German language, in 1834; also, a reprint made in Edinburgh, with copious notes by the celebrated Dr. Combe, one of the most distinguished of the members of the Royal Academy, and this is the very copy sent to Dr. Beaumont by the very learned author. I have seen reviews and complimentary notices in the London Medico Chirurgical Review, and in many of the Journals of Science in this country. It would appear therefore, that Dr. Beaumont and his book, are not quite so obscure and insignificant as the gentleman may have supposed, and that in his particular profession he enjoys a reputation quite equal to that which the learned counsel can, even himself, imagine that he does in the law; for, great as is *his* fame, and unquestionable as is *his* right to the position which he occupies, I believe *his* writings and orations have not yet attracted the

attention of the *savants* of Germany, England and Scotland. The gentleman affects that this onslaught upon Dr. Beaumont was made with great reluctance, but it seems to me that he entered upon the task with great *gusto*, and dwelt upon it as an inexhaustible source of amusement and rail-lery.

He denied that the English common law on the subject of provocation was not the law of Missouri.

Laws are made to prevent crime, and they punish offenders, because that is the best way of preventing them. They are, however, rendered impotent and nugatory by a refusal on the parts of courts and juries to put them into force, which would be a restoration of the age of barbarism, when every man becomes the avenger of his own wrongs, his own judge of the measure of punishment, and of the nature of the injury. This resort to brute violence is, I am sorry to say it, too frequently adopted in our country, under the modernized appellation of "Lynch Law." Ought not the influence of courts and juries be brought to check this fell spirit? And if not checked, does it not bid fair to demolish our social fabric, to overturn the foundations of law, order and public peace; and in a word, to blast, like the simoon of the desert, every thing that is good, valuable, worth cherishing or having, in our political institutions? There is but one power that can save us from the demoralizing and destructive influences of this disorganizing spirit, and that power is a jury. Upon them devolves the duty, upon them rests the fearful responsibility of checking this fatal tendency to disorder and open violations of the law.

Mr. Geyer did not condescend to enlighten us with any judicial opinions upon the subject of provocation, but he relied upon his *own* repeated and positive declarations, which he aided with copious extracts, *by way of authority*, from the speeches of Rowan and Prentiss, delivered in defence of Judge Wilkinson at Louisville. So much for authority, now for principle. The gentleman recited what he termed some of the monstrous absurdities of the English

law. For example, if one man attempts to cowhide another, the individual attacked, although lacerated and striped with this disgraceful instrument, is bound to retreat, if he cannot otherwise defend himself, to the wall, and only then, and after all other means have failed, would he be justified, on the score of self-defence, in taking the life of his assailant. Ask a free-born Kentuckian, or one of Missouri's brave and generous sons, said the gentleman, if this be the law by which he is governed. The "brave and generous son of Missouri" would very readily answer that question, if he had read the statute book of his own state, by replying, no, and for the very reason, that by express statute law no man is obliged to submit to the laceration of the cowhide or any other grievous bodily injury; but he would be justified in taking the life of his assailant. He would be justified, expressly on the ground that the law of our state makes just such a case justifiable homicide—but not from any vague, indefinite, undefinable notions of honor, chivalry, moral duress, and public opinion, which overleap the barriers of the law, and about which the gentleman discoursed so long and so fervently. The gentleman was disposed to dive into the causes of things, and to explain the reason for these absurd notions which had crept into the English law. He said that the crown was the focus of power, that judges in their decisions had generally an eye to favor and influence in that quarter, and that it was the policy of the king to save the lives of his subjects, because he had use for them to fight his battles. I do not coincide with the learned gentleman in his philosophy of the law, any more than I do in his views of the law itself. The tenderness of human life which has become a part of the English law had its origin in a deeper and purer feeling than that. It had its origin in that holy and religious awe which their good christian ancestors had, and which all persons of proper feelings must always have, at the bare idea of taking away the life of a human being. Though the passions of men sometimes get the ascendancy of this sacred feeling, yet it is one that is

born with us. It is the great distinguishing trait by which the human species is preserved from the most savage ferocity, and it is never obliterated until all the better principles of our nature have become stifled and darkened. The laws of all nations in all ages have shown this regard to human life. He who saved the life of a Roman citizen, received a higher reward than he who first mounted the ramparts of a besieged city.

Mr. Engle maintained that to excuse homicide it must be shown:

1st. That no dangerous weapon was used.

2nd. That the killing was not done in a cruel and unusual manner.

3rd. That it must have been by accident or misfortune.

4th. That it must have been done in the heat of passion.

5th. There must be a sudden provocation.

6th. This provocation must not only be sudden but sufficient.

After a review of the arguments and the judicial decisions on these points he closed.

It is no wonder that the gentleman broached new law; it is no wonder that he proclaimed that a libel, and consequently all irony and newspaper censure, justified a battery; it is not surprising that he rejected all authority from books, and made his own law as he proceeded. With such facts and such a case, what could he do but sneer at Judge Hale, justify and defend lynch and mob laws in all their enormities, and found his defence, not upon the statute book, but upon primitive and original notions, by which men are usually governed, when there is no law but their own wild passions! I seek, gentlemen, to tread a plainer and a humbler track. A genius can repudiate the old lights and guides, and strike out a new and brilliant orbit for himself. I am content to walk in the old path of the law. The learned gentleman, in his pathetic and eloquent appeal to you, made in his closing remarks, endeavored to give great importance to the high standing of the accused in the community, and

claimed him as one of *his* friends, upon whom to bring dishonor and disgrace would be to inflict a loss on society. All this may be true, or it may be not; but it cannot, for it ought not, in the slightest degree, to affect your verdict. The meanest and the lowest are entitled to have the law administered to them with the same strict justice and impartiality as the loftiest and the noblest. It is sometimes used as a satire upon the administration of justice, that its only effect is to punish the feeble and the friendless, while the rich and the powerful are permitted to escape with impunity—that the law is at best a mere cobweb, which entangles only the feebler of the insect tribe.

“Plate sin with gold and the strong lance of justice hurtless breaks,
Arm it in rags, and a pigmy’s straw doth pierce it.”

I did not suppose that what had been used as a satire and reproach would have been held up to you as an inducement to verify the words of the poet.

The learned gentleman has told you, that in a practice of twenty-five years, he has not seen a more important case, or one in which more important principles were involved. The honor and character of the city, the peace and safety of her citizens, are in your keeping. There rests a foul blot upon our escutcheon, it is for you to wash it out. In the language of a judge, in one of the cases which I have quoted to you—“It is no less the duty of a jury to guard themselves against being influenced by a weak apprehension of the consequence of a verdict to give comparative impunity to a criminal, who is proved by the testimony to be guilty of a higher offence. In such a case, a jury at once trifle with the solemn obligation, by which they are bound to the Almighty to find a verdict according to the evidence, and prostrate the laws of the commonwealth, created for the protection and the preservation of human life.”

You will give the case the benefit of your coolest, most deliberate, and most unbiased judgment. Every principle of honor, of duty, of patriotism and religion demands it at your hands. You will weigh well the importance of human

life, and you will say, whether a frail mortal shall send one of his fellow beings, unprepared, to the presence of his Maker, without a sentence of condemnation, or a word of reproach. Existence is the first great gift of Omnipotence to man. We cling to it in youth, and age only tightens the hold which it has upon our affections. Shall anyone be so presumptuous as to arrogate to himself the attributes of the Deity, and snap asunder the mysterious thread of human life, to gratify his own revengeful passions, and yet be permitted by the verdict of a jury, to walk with head erect as if he had done no evil?

You have been asked to temper justice with mercy, to "stretch the law," (that was the phrase,) in order to save the present defendant from ignominy and punishment.

What kind of mercy did he show to poor Davis, when, with his murderous weapon, he fiercely dealt the blows in hot and quick succession, which terminated his earthly career? See the victim of his rage, standing, as Mr. Amos described him, when he came up, his head upon his bosom, his arms hanging loose by his side, and the blood streaming down his face, while his haughty and implacable assailant stood calm and unperturbed, coolly surveying the mischief he had done. Had some mild spirit whispered mercy in his ear at the moment he was inflicting the fatal blows, think you, that it would have stayed the fall of the engine of death? That one pang of generous recollection, of ancient good fellowship would have touched that heart? Or rather, would he not have said, as he did to Mr. Henry five minutes afterwards, "I do not care if I have killed him, *I have had my revenge.*"

But it is not for the purpose of revenge that I ask for his condemnation at your hands. The law is not governed by the weakness of human passions, and acknowledges no such motives for punishment. You are invoked to punish this defendant, because you are sworn to administer the law.

You cannot with safety to the community, with reverence to the laws, and with a due regard to every obligation under

which you labor, proclaim this man innocent, and thus establish a principle, which strikes at the foundation of civil government and of social order. If you do, trials hereafter will be but mock trials; the bowie knife, the pistol, and the iron cane will become as familiar as household words; the laws will be trampled under foot, or laughed to scorn; until, at length, we shall be reduced to the melancholy condition of a people with good and wholesome statutes, without public virtue enough to put them in force, worse even than the ancient city of Vienna, as described by one of its Dukes:

"We have sharp statutes and most biting laws,
Which, for these fourteen years, we have let sleep.
————— So our decrees,
Dead to infliction, to themselves are dead,
And Liberty plucks Justice by the nose."

THE CHARGE OF THE COURT.

JUDGE BOWLIN. Gentlemen: Manslaughter, as a distinct offence, comes under that general class of crimes known as homicides or man-slaying. At common law there were but two grades of homicides, or man-killing, worthy of notice, which were the subjects of criminal punishment—to wit: murder and manslaughter. Manslaughter, as an offence at common law, which equally applies to our statutory offences, is principally distinguishable from murder in this: that though the act which occasions death is unlawful, or is likely to be attended with bodily mischief, yet the malice, either express or implied, which is the essence of murder, is presumed to be wanting in manslaughter; the act being rather imputed to the infirmity of human nature, and the act is presumed to have been done altogether sudden and without premeditation. But our legislature, from a humane design to appropriate to each grade of crime an appropriate punishment, and lessen the rigors of the common law to some extent, has divided homicides into a variety of grades—to wit: Murder is divided into the first and second degrees, and manslaughter into four degrees, and each degree preserving some distinct characteristic of the offence different from the others. But the distinctive characteristic of manslaughter, in every degree, by our statute, is, that the act of killing was done without a design to effect death. But the indictment charges this offence in the third degree, which will relieve me from the necessity of noticing the higher degrees, as they are entirely out of your investigation. In crime of different degrees, it is competent for you to find in a lower degree than the one charged, but you cannot find a higher degree. Hence I shall begin with the third degree.

The 13th section of the statute under which this indictment is found, is as follows: "The killing of another in the heat of passion, without a design to effect death, by a dangerous weapon, in any case except such wherein the killing of another is justifiable or excusable, shall be deemed manslaughter in the third degree." Then the indictment charges that the killing was done "in the heat of passion, without a design to effect death, by a dangerous weapon;" and as the two first clauses of the charge are beneficial to the defence, and of course not brought in question, I shall not comment on them. The third clause is that it was done "by a dangerous weapon." "A dangerous weapon" is not such a technical phrase in law, as applies itself to any particular kind of instrument that may produce evil consequences or death. A crow bar, as a sword, as many other instruments are dangerous weapons, if attempted to be used with force. The better opinion is that a weapon, as referred to in the statute, is any instrument, carried for purposes offensive and defensive; and is dangerous when it is of such a character as, when used, is likely to produce death or great bodily harm. Then the court should define a dangerous weapon to be such an instrument as comes under the definition of arms, or are deadly, or seriously injurious in their character; and also such instruments as are carried for purposes offensive and defensive, and which are likely in their use to produce death, or great bodily harm. Their probable effect is a subject for the jury.

The 19th section of the statute defining manslaughter in the fourth degree, is as follows, to wit: "The involuntary killing of another by a weapon, or by means neither cruel or unusual, in the heat of passion, in any cases other than justifiable homicide, shall be deemed manslaughter in the fourth degree." To constitute the offence under this section the killing must be involuntary, by a weapon, and in the heat of passion; and differs from the offence in the third degree chiefly in this, that the weapon is not, in the ordinary sense of the word, *dangerous*, and that the whole act, as well the assault as the killing, is involuntary, and in the heat of passion. The material ingredient of distinction between manslaughter in the third and fourth degrees, is the character of the instrument used—whether a *weapon* merely, or a *dangerous weapon*, the distinction between which is taken in the definition above given of the instrument.

If then, gentlemen of the jury, you are satisfied (from the evidence) that the defendant, William P. Darnes, did, in the heat of passion, without a design to effect death, by a dangerous weapon, kill and slay Andrew J. Davis, as charged in the indictment, you will find him guilty of manslaughter in the third degree, and so finding, specify the degree, and fix the punishment at imprisonment in the penitentiary for a term not exceeding three years, nor less than two.

If the jury should find the killing as above, but with a weapon not dangerous, they will find him guilty of manslaughter in the fourth degree, and so finding, specify the degree, and fix the pun-

ishment by imprisonment in the penitentiary for the term of two years, or by imprisonment in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment.

If the jury entertain any rational doubt of the guilt of the accused, he is entitled to the benefit of such doubt, and the jury should acquit.

1st. If the jury are satisfied from the evidence, that the wounds inflicted upon the head of Andrew J. Davis were adequate to produce death, and that Andrew J. Davis died of inflammation of the brain, or any other disease produced by those wounds, on the 7th or 8th day after the infliction of the wounds, it will be a homicide on the part of the said William P. Darnes, unless it is *clearly* shown to the satisfaction of the jury, that the deceased died from the bad or unskilful surgical or medical treatment, or both.

2d. If the jury are satisfied from the evidence that the wounds were in their nature dangerous, and upon a vital part likely to take away life, and that the deceased had the prompt attention of surgeons and physicians of such skill and capacity as persons would ordinarily call in under like circumstances, and that the deceased died of the wounds, or of inflammation of the brain induced by the wounds, it is not enough to raise a doubt whether a different mode of treatment might not have cured the patient, but the accused must clearly show to you such palpable evidence of mal-practice, as to satisfy your minds that the deceased died of the treatment and not of the wounds—otherwise it will be homicide upon the part of William P. Darnes.

3d. If the jury are satisfied from the evidence that William P. Darnes unlawfully killed Andrew J. Davis with a dangerous weapon, or in a cruel or unusual manner, it will be their duty to bring in a verdict of guilty of manslaughter in the third degree, even although the killing should have been upon sudden and sufficient provocation, or upon sudden combat, without any undue advantage being taken.

4th. If the jury are satisfied from the evidence that there was an unlawful killing by a weapon, but not a *dangerous* weapon, and by means neither cruel nor unusual, and that there was no sudden and sufficient provocation, or that it was not upon sudden combat, without any undue advantage being taken, it will be manslaughter in the fourth degree.

5th. To make provocation an excuse, it must be both sudden and sufficient to excite and arouse the passions. If after receiving the provocation, and the inflicting of the blows, there be sufficient time for passion to subside, and reason to interpose, it will not be in law a *sudden* provocation that will excuse the homicide.

6th. The provocation must be sufficient, and given by the person who was the subject of attack.

7th. No affront by the bare words or gestures, however reproachful, contumelious or insulting they may be, will be such a provoca-

tion as to justify or excuse a homicide, if the injuries were inflicted with a weapon and in a manner likely to produce death.

THE VERDICT.

At 5:20 p. m. the *Jury* retired to consider their verdict.

November 14.

At 9 a. m. the *Jury* returned into court.

The Clerk: Gentlemen of the jury have you agreed upon your verdict?

The Foreman (Theron Barnum): We have. We find the prisoner guilty of manslaughter in the fourth degree and assess his punishment at a fine of five hundred dollars.

THE TRIAL OF WILLIAM FREEMAN FOR THE MURDER OF JOHN G. VAN NEST, AUBURN, NEW YORK, 1846.

THE NARRATIVE.

On the western border of Oswasco Lake in the town of Fleming, about three miles from Auburn, N. Y., there lived a respectable and worthy farmer, John G. Van Nest. He was a man of good education, of considerable wealth, had held various offices of honor and profit and was extensively known and highly esteemed. His family consisted of his wife, Mrs. Wyckoff, (his mother-in-law) three young children and Helen Holmes, a young woman who lived with them in the capacity of help. And there was also at the house a Mr. Van Arsdale, a guest. As the family were retiring to rest on the 12th of March, 1846, a tragedy was enacted which is almost without a parallel in the history of crime. Without the least premonition or provocation, John G. Van Nest, his wife and their youngest son were slain and left weltering in their blood, Mrs. Wyckoff mortally and Van Arsdale severely wounded by the hand of an assassin.

On the morning of March 13 at a place called Schroepfel, some miles from Auburn, a negro asked a man named Amos, whether he would buy a horse which he showed him. Amos who recognized him, was suspicious and after he had offered the horse to other persons at the tavern where the parties were, concluded that he had stolen it and arrested him after a struggle and turned him over to the authorities, to whom that very day he confessed all. His name was William Freeman, a good-for-nothing, half-witted negro of 23, who at the age of 16, after numerous petty thefts had been sent to the State Prison for five years for horse stealing. He

came out at the end of his term impressed with the idea that he had been wrongly imprisoned and ought to be paid for his time and labor there. He called on Mrs. Godfrey, whose horse he was convicted of stealing, and on her refusal to pay him, applied to two magistrates for process against her and the other persons who had been instrumental in his conviction. These applications being refused he reasoned himself into a belief that the laws of the country afforded him no protection against oppression and injustice. He then prepared a butcher knife and a club with a knife inserted in the end and on the night of the 12th of March approached the house of Van Nest, lay in wait until he saw a man who had passed the evening with the family, leave for his home, and then meeting Mrs. Van Nest in the yard, stabbed her, then entered the house and stabbed Van Nest to the heart, thrust the knife through the body of a child two years old, attacked and wounded Van Arsdale and Mrs. Wyckoff, but not until he had been severely cut in the wrist in the struggle, thereby disabling him from further prosecuting the work of death. Neither Mr. Van Nest nor any of his family had anything to do with the prosecution, sending him to prison for horse-stealing, and though he went into every room in the house he took nothing from it. But he stole a horse from the stable which fell with him after he had gone two miles. He proceeded a short distance on foot when he stole another horse and rode to Schroeppel.

The tragedy shocked and exasperated the whole community and it was with difficulty that the wretch was saved from summary execution by the neighbors of the murdered family. He was speedily indicted and the demand of every citizen was that he should be promptly convicted and hanged and that no plea of insanity should be listened to. But there arose in their midst a champion of a proper trial where all legal defense should be considered. William H. Seward, ex-Governor of the state, a leader of the bar, in after years a great national figure, and destined himself to be the victim of an historical assassination, was a resident

of Auburn and, impressed with the belief that Freeman was insane and not responsible for his act, volunteered to be his counsel on his trial.

In July the trial took place for the murder of John G. Van Nest. Mr. Seward pleaded first that the murderer was then insane and therefore unable to conduct his defense. A jury was at once impanelled to try this issue and after hearing the testimony of experts and others returned a verdict that "the prisoner is sufficiently sane in mind and memory to distinguish between right and wrong." He then pleaded not guilty but as the killing of Mr. Van Nest was not disputed the second jury had but one question to decide: viz, was he sane or insane at the time of the murder?

Mr. Seward argued that the whole history of the man, as proved by the witnesses for the defense, showed his insanity; that he was hereditarily disposed to insanity, an uncle and an aunt of his were insane for many years; that he had been exposed to causes both mental and physical—likely to develop this disease: arrested and imprisoned when a boy but sixteen years of age for a crime which there was good reason to believe he did not commit, whipped repeatedly when in prison and struck on the head with a board and rendered deaf; that after five years of imprisonment he came out changed in appearance, manner and character; from being a lively, bright lad was now a dull, unsocial and apparently idiotic being, complaining that he had been abused, that he had worked five years in prison and ought to be paid for it, which notion engrossed all his thoughts; that suddenly he undertook to right himself or get his pay, and solely by the most bloody yet most irrational means (the offspring of insane delusion) "by killing round awhile" as he phrased it, and without any attempt to plunder or any regard as to whom he destroyed—indifferently, men, women, the sleeping infant—those who were entire strangers to him and who he knew and acknowledged had never given him any cause of offense whatever; that arrested for these crimes, in answer to questions he confessed all. But from

that day during his imprisonment he never asked a question respecting his probable fate, nor took the least interest in the proceedings for and against him; never asked his counsel a question nor made any suggestion to them or to anyone else; that during his trial he did not betray the least emotion nor exhibit any consciousness of what was going on in court, but day after day sat by his counsel apparently regardless of everything and everybody and without any change of countenance except the frequent, unconscious laugh of the idiot.

The Attorney-General, a son of a President of the United States, maintained that while Freeman was a stupid, depraved criminal, ignorant and of a low grade of intellect, he nevertheless was able to distinguish between right and wrong and knew that what he did was contrary to law, which was the only test in courts of law, of insanity.¹

¹ "An ignorant, dull, stupid, morose and degraded negro, but not insane." Dr. Bigelow, the leading expert for the people. He was born at Auburn, in 1824. His father was a slave who had obtained his freedom by purchase under the New York laws in 1815; his mother, born in Stockbridge, Mass., was half negro, half Indian. As a boy he received no schooling but at the age of eight was placed in a family at Auburn as a house-boy, but he did not stay long there as he was unreliable and would run away from his work after a few weeks in the different families where he was employed. Later he served as a waiter at several hotels and did manual labor of various kinds up to the Spring of 1840, when a horse was stolen from the stable of a Mrs. Godfrey, about five miles from Auburn and he and another negro named Furman were arrested as the thieves. He broke the lock of his cell but was recaptured and on the trial Furman turned State's evidence and mainly on his testimony, Freeman was sent to the State prison for five years, in spite of his denial of his guilt. In prison he would not work, alleging that he was innocent, and he was frequently punished for disobeying orders and for fighting with other prisoners. He was considered by the authorities as a dangerous man. He came out of prison in September 1845, morose and partly deaf and swearing revenge on his persecutors as he called them. And there is good reason to believe that he was not guilty of the felony but that Furman was. He went to live with his brother-in-law, was sometimes employed in sawing, but was stupid and indolent and talked of little but of his grievance and of his determination that some one should pay him for his work while he was in prison. He applied to two magistrates for

A host of medical experts gave their opinions but these were about evenly balanced both in number and authority. The jury promptly returned a verdict of guilty and the negro was sentenced to death. But Mr. Seward appealed to the Supreme Court which ordered a new trial, mainly on technical matters of procedure.

Freeman was never tried again. While the case was pending in the Appellate Court he had been declining in health and on August 21, 1847, died in his cell of disease of the lungs.

THE TRIAL.²

*In the Court of Oyer and Terminer, Auburn, New York,
July, 1846.*

HON. BOWEN WHITING,³ Judge.⁴

June 1.

On May 18 the Grand Jury of the County of Cayuga returned an indictment against William Freeman, laborer,

warrants against Mrs. Godfrey and others and when they were refused, told several persons that the law would not do anything for him so he must do it himself. He left his brother-in-law's and went to live with a colored washerwoman who gave him his board for helping her carry her baskets of clothes to and from those in the village for whom she worked. Her account of him is, that he did not hear very quick; that he never said much, and spoke only when spoken to; that he never asked any questions himself, and answered those put to him very briefly. While there he committed the murders of the Van Nest family.

² *Bibliography.* "The trial of William Freeman for the murder of John G. Van Nest, including the evidence and the arguments of counsel, with the decision of the Supreme Court granting a new trial, and an account of the death of the prisoner, and of the post-mortem examination of his body by Amariah Brigham, M. D., and others. Reported by Benjamin F. Hall, Counsellor at Law. Auburn: Derby, Miller & Co., Publishers, 1848."

³ WHITING, BOWEN. Native of Massachusetts but early member of the bar of Ontario Co., N. Y., having a residence at Geneva. Dist. Atty. 1823; member of Assembly 1824-25; county judge 1838; judge of Seventh Circuit 1844. From *History of Ontario County, N. Y.*, 1893, p. 168.

⁴ With the Circuit Judge sat Justices Joseph L. Richardson, Isaac Sisson, Abner Hollister and Walter G. Bradley.

charging him with the murder of John G. Van Nest, at the town of Fleming in said county, on March 12, 1846.

Today the prisoner was arraigned.

John Van Buren,⁵ Attorney-General, and *Luman Sherwood*,⁶ District Attorney for the People; *William H. Seward*,⁷ *David Wright*,⁸ *Christopher Morgan*⁹ and *Samuel Blatchford*¹⁰ for the prisoner.

Mr. Seward tendered in behalf of the prisoner a plea of insanity.

JUDGE WHITING said that as the statute expressly declared that no insane person shall be tried, this issue must be disposed of first, and how that was to be done he was not prepared to decide until he consulted with his brethren. As it was a matter resting in the discretion of the Court he would hear the views of counsel.

Mr. Sherwood: The Court might determine the present

⁵ VAN BUREN, JOHN (1810-1866). Born Hudson, N. Y.; grad. Yale 1828; admitted to Bar 1830. Accompanied his father—afterwards President of the United States—to London as an attache of the legation. Atty-Gen. N. Y. 1845-46. Died on voyage from Liverpool to New York. Was popularly known as "Prince John."

⁶ SHERWOOD, LUMAN. Dist. Att'y, Cayuga Co., N. Y. 1844-47. Inspector Auburn Prison, 1845.

⁷ SEWARD, WILLIAM HENRY (1801-1872). Born Florida, N. Y. Grad. Union Coll. 1820. Admitted to Bar (Utica, N. Y.) 1822; began practice at Auburn, 1823; State Senator 1830; Governor of New York 1838-1842; United States Senator 1849-1861; Secretary of State 1861-1869; died at Auburn. See 3 Am. St. Tr. 10.

⁸ WRIGHT, DAVID (1806-1876). Born Penn's Manor, Bucks Co., Pa. Arrived New York 1826. Employed by Seneca & Cayuga Canal Co. Admitted to Bar 1832. Established himself 1832 at Aurora, remaining there until 1839 when he removed to Auburn. His practice had a wide and extended range. See "Biographical Review, Cayuga Co. 1894, pp. 378-380.

⁹ MORGAN, CHRISTOPHER (1808-1887). Born Auburn, N. Y. Grad. Yale 1820. Member of Congress 1839-1843. Secretary of State (N. Y.) 1848-1852. Mayor of Auburn, 1860. Died at Auburn.

¹⁰ BLATCHFORD, SAMUEL (1829-1893). Born New York City. Private Secretary to Gov. Seward 1839-1841. Military Secretary 1841-1843. Practiced law first at Auburn but removed to New York 1854 and acquired an extensive practice in Admiralty. U. S. District Judge (N. Y.) 1867-1882. Associate Justice Supreme Court of the United States 1882-1893. Died at Newport, R. I.

sanity of the prisoner either by a personal inspection and examination, with or without the aid of physicians or by a jury to be empanelled for that purpose. As I have from observation and conversation with the prisoner satisfied myself that he is not insane, a similar examination might satisfy the conscience of the Court.

Mr. Seward: Insanity as a fact should be determined as other questions of fact are required to be in criminal cases. In that view I suggest a trial of the issue by a jury. It is important to the people as well as the prisoner, that such an investigation be made as shall be entirely satisfactory to the Court and to the public. If the prisoner be insane as the plea alleges, he ought not to be required to answer; if he be sane he should be tried. Whilst the examination of the district attorney has convinced him that Freeman is sane, my examination has convinced me that he is insane. Others with equal advantages for arriving at the truth, corroborate my opinion. If a trial by jury were the right of a sane man ought it not to be accorded to one who cannot hear you nor make any election in the premises himself?

June 25.

Mr. Wright (to the jury): While I am impressed with the belief that the prisoner is insane I am not without information that others differ in opinion. The circumstances of the massacre, however, are themselves indicative of insanity rather than of depravity. There was such an absence of motive on the part of the prisoner for the commission of an act so dreadful and revolting, that the first mention of the case awoke in my mind suspicion of insanity. With others I have been confirmed in that impression after seeing the prisoner and learning more of his history and behavior. Insanity was hereditary in his family; being predisposed to that disease some of his ancestors had become insane for causes apparently trivial. Freeman had himself been imprisoned for another's crime and had been subjected to the lash for pretended offenses. A blow had injured his hearing and I have seen him in his cell, deaf, indifferent to his fate and unconscious of danger; I observed his vacant stare and idiotic smile. Whilst I am shocked at his deeds I am moved with pity for his condition and believe him a proper subject of sympathy rather than of prejudice and indignation. At the request of Governor Seward I have been assigned by the Court as counsel in his behalf. An unsought responsibility now rests upon me as counsel; a responsibility that is akin to that resting upon

you as jurors. It is a responsibility that must be borne without fear, favor or the hope of any reward save that which would arise from seeing justice dispensed and the law vindicated. You and I must dispel from our minds every semblance of prejudice and proceed to inquire whether the wretched prisoner at the bar be a sane or insane man. It is an investigation that will require time, labor, patience and care. The prisoner's counsel have, in the honest discharge of their duty, deemed it just to plead for him a plea that he cannot understand. As little did prisoner understand the nature of this investigation or the proof to be made. I am here because the law requires it; not to dictate a defense of which he is as ignorant as the posts which support the dome under which you sit. What is done by us comes from no agency of his, but from the dictates of conscience and the promptings of humanity. We ask, then, your best attention whilst we spread before you the condition of his mind by the testimony of witnesses, remembering that human life probably hangs upon the issue.

(A number of witnesses were examined whose testimony is given more fully before the second jury, Post p. 362.)

Mr. Sherwood then examined a number of witnesses for the People (see their testimony post p. 344) having first told the jury that if they found that the prisoner was competent to distinguish between right and wrong, the prosecution would insist that he was legally sane, and answerable to the law for his crime.

Mr. Van Buren then addressed the jury for the People and *Mr. Seward* for the prisoner.

July 4.

JUDGE WHITING told the jury that the statutes of the State provided that no insane person shall be tried, and that it was for them to decide after listening to all the evidence whether Freeman was or was not insane at the present time.

The law presumes every man sane until the contrary be proved. It is, therefore, a fact to be proved, like any other fact, to the satisfaction of a jury. To establish the fact of the prisoner's insanity, it must be proved that he is laboring under such a defect of reason from disease as not to be able to distinguish right from wrong. If some disease is the acting power within him which he cannot resist; or if he has not sufficient use of his reason to control his passions; if he is dispossessed of the free natural agency of his mind, he is insane, and cannot be tried. Or if his moral and intellectual powers are so deficient that he has not sufficient memory, will, conscience, or controlling power, or if through the overwhelming violence of mental disease, his intellectual power has for the time been obliterated, he is not to be placed on trial for his acts. Does the proof in this case bring the prisoner within this rule?

July 5.

The Jurors came into court and reported that they could not

agree, as they stood 11 to 1 in the opinion that the prisoner was sane.

Mr. Davis said he was the one dissenting, because although it had been proved that he had memory and knowledge of events, it had not been shown that he was able to reason properly.

JUDGE WHITING: There is one thing I omitted in my charge yesterday—the evidence of his guilt as laid in the indictment. The prisoner is not on trial before you on that charge, yet the evidence was deemed proper for the purpose of comparing the knowledge of the prisoner with the knowledge of other persons of the same facts; and if his knowledge of many of these facts corresponds with others known to be sane, then the jury were to say whether the prisoner did not disclose a state of mind sound and sane as to those matters. And so of other events and transactions of his life. If he shows a knowledge and memory coinciding with the knowledge and memory of others known to be sane, the jury are to say whether that is, or is not, evidence of sanity. Insanity is unsoundness of mind; a change of character from soundness to unsoundness. It is alleged that the prisoner has dementia. Instances of this condition of the mind are doubtless familiar to some of you, in cases of extreme old age, where the mind and memory have decayed and lost their power. If the prisoner have that form of insanity, when did it occur, and when did the change take place? The main question for the jury to decide is whether the prisoner knows right from wrong. If he does, then he is to be considered sane. I do not believe that there is evidence of delusion, as there is proof that it is common for convicts to claim pay for being confined. It is important that the jury should agree upon a verdict, and it was the duty of the Court to keep them together until they agreed. Your verdict is for the information of the Court, and hence, the Court may confer with you with more freedom than in a case where your verdict would be final as to the guilt or innocence of the accused.

At 8 p. m. the jury returned with the following verdict: We find the prisoner sufficiently sane in mind and memory to distinguish between right and wrong.

The prisoner's counsel asked the Court to reject the verdict and to instruct the jury to find a verdict upon the issue raised by the plea of insanity, viz: Is he sane or insane?

JUDGE WHITING refused and directed a verdict of sanity to be recorded.

July 6.

The prisoner was again arraigned, the indictment was read and he was asked if he demanded a trial.

The prisoner: No.

The Clerk: Have you counsel?

The Prisoner: I don't know.

The Clerk: Are you able to employ counsel?

The Prisoner: No.

The Court: Let a plea of not guilty be entered.

Mr. Seward moved for a continuance which was refused by the Court.

Mr. Seward moved that the indictment be quashed because one of the grand jurors was a near relative of the persons slain by the prisoner; also that the array of petit jurors be set aside because there had been stricken from the list by the Court two men who were Quakers. The Court refused. The clerk then proceeded to empanel the jurors and after no less than 65 jurors had been examined the following were selected and sworn:

Andrews Preston, Lyman Royce, William Tremaine, Thomas C. McFarlane, John Christian, Norman Peters, Benjamin Beach, Gatter V. Peak, Tompkins Tripp, Obadiah A. Cooper, Archer Macomber, John C. Yawger,¹¹

THE DISTRICT ATTORNEY'S OPENING.

July 10.

Mr. Sherwood. Gentlemen of the Jury: The prisoner was born in this village, and with the exception of some brief periods of time, has always resided here or in the immediate vicinity of this place. His father was an African—his mother was the offspring of an African and Indian. He resided with different persons in the village, or adjacent to it, during the period of his boyhood and till the age of sixteen or seventeen years, when he was convicted of the crime of larceny for stealing a horse, the property of a widow lady in an adjoining town, and sentenced to State Prison for the term of five years. I am aware of nothing in his character or conduct, previous to that conviction, not common to colored boys in his circumstances and condition in life, except, perhaps, he was more vicious than ordinary boys, which resulted in frequent changes of abode.

During this period his education was entirely neglected, so that he entered the State Prison an ignorant boy at the age of seventeen. You are aware that the discipline of that institution inhibits that social intercourse which, with the uneducated, is essential to their intellectual advancement; and except with the chaplain and principal officers, only admits of such communications between convicts and keepers as are necessary in reference to the work at which the former are engaged. Practically, the chaplain is the only officer from social intercourse with whom convicts may be said to derive any benefit. In this case, that officer found the prisoner so deaf that it was difficult to converse with him, and we may fairly infer that the prisoner's mind could not have been improved by five years' tuition at hard labor in the State Prison. He was discharged from prison on the 20th day of September, 1845. From the time of his discharge until the 12th of March last, (when he committed the

¹¹ The first two jurors accepted and sworn were appointed as triers of the challenges of the remainder.

crime for which he now stands indicted,) he remained most of the time in the village, and earned his subsistence principally by sawing wood.

Gentlemen, you will readily see from the hasty narrative I have given of this man's life, that he could not have been otherwise than an ignorant, degraded being. Yet, ignorant and degraded as he was, he had sufficient knowledge to plan a crime, and sufficient sagacity to contrive all the means of its execution; and, that too, with as much skill as the more gifted in intellectual capacity. A few days previous to the commission of this crime the prisoner purchased of a blacksmith in this village, by the name of Hyatt, this knife, (holding up the knife, then in two parts, a part of the blade having been broken off, with which the murder was supposed to have been committed.) About the same time, or shortly before, he took to the shop of another blacksmith this dirk pattern, (holding up the pattern of a dirk) and attempted to negotiate for the making of a dirk like it. In these transactions he manifested a regard for money which resulted in his purchasing the knife at half the price which the blacksmith asked for it, and broke off the negotiation for the dirk without a bargain. Failing in procuring the dirk as he desired, he finally obtained a common butcher knife, which he ground on the back and inserted in the end of a club some four feet in length. He was seen with these instruments at a mechanic's shop, in the east part of the village, shortly before the murders were committed; and it will appear in the course of this investigation, from the confessions of the prisoner and from other evidence, that just at twilight on the evening of the 12th of March, he proceeded with these instruments from his boarding house, in the east part of the village, to the house of the deceased, about three miles distant; that he was seen in the vicinity of Van Nest's house about nine o'clock in the evening; that he remained near the house till Van Arsdale, who was staying at the house, had retired to bed in the chamber, and a man by the name of Williamson, who had been spending the evening sociably in the family of Van Nest, had proceeded toward his home in that neighborhood. The family of Van Nest consisted of his wife, three children, Mrs. Wyckoff, (his wife's mother) a young lady by the name of Helen Holmes, and Van Arsdale. After Williamson had left, and Van Arsdale retired, the prisoner entered the house, and with the knife you have seen, stabbed Van Nest in the breast, penetrating the heart, and inflicting a wound of which he instantly fell lifeless. He then came in contact with Mrs. Van Nest, and stabbed her in the abdomen, inflicting a wound of which she expired in a few minutes. He then proceeded to a bed on which their youngest child, a boy of two years of age, was lying, and thrust the knife entirely through his body, severing the bowels, and inflicting a wound of which he expired after languishing in agony about thirty minutes. He then came in contact with Mrs. Wyckoff, and inflicted upon her a wound of which she died in some two days thereafter.

He then proceeded to the room of Van Arsdale and stabbed him in the breast, and had an encounter which resulted in Van Arsdale's driving him from the house. After this, the prisoner again came in contact with Mrs. Wyckoff at the gate of the door yard, and had an affray, in which she, with a butcher knife with which she had taken the precaution to arm herself, inflicted a wound upon him, severing the tendons of his wrist, and disabling him from further prosecuting the work of death. Mrs. Wyckoff, wounded as she was, proceeded in her night dress to her neighbor's, carrying the marks and giving the alarm of this family slaughter, while the prisoner proceeded to the barn of Van Nest, stole and mounted a horse, and proceeded towards Auburn, passing Williamson in less than a mile from the house of Van Nest, and continued till within a mile of the village, where the horse fell with him. He then left that horse and proceeded to the barn of a man by the name of Burrington, some three miles east of Auburn, where he stole another horse, with which he made his flight, by way of Syracuse and Baldwinsville, to a village in the county of Oswego, where he was arrested, first on suspicion of having stolen the horse, which he there offered for sale, and finally for the crime of which he now stands indicted.

It is proper to call your attention to the fact that the prisoner is, and has for years been, partially deaf. And in this connection I may say that his ability to hear appears to be suddenly effected by circumstances, if not measurably *affected* to suit the occasion. For, when offering this horse for sale, and when charged simply with larceny, those with whom he conversed found little difficulty in making him understand, or in understanding him. But when charged with the higher crime of murder, and when inquiries were made of him concerning it, and from whence he came, he suddenly became so deaf that it was only by threats of violence, which were in some measure executed, that he could be made to hear at all. Upon his arrest, he was taken to the scene of his crimes, where he was identified, and thence to jail to await an indictment and the trial in which we are now engaged.

The fact that one trial has already been had upon the principal question that involves the guilt or innocence of the defendant, is, I trust, a sufficient apology to detain the cause to allude briefly to some of the circumstances attending it, and the evidence upon which the prisoner's counsel rely for his acquittal.

On the first day of the present sitting, the prisoner was brought in to be arraigned, and before his arraignment his counsel appeared at the bar and interposed in his behalf the plea of present insanity. Never before having seen the prisoner, except as he entered the jail upon his arrest, and knowing nothing of his mental condition, I took issue upon that plea, had him remanded to prison, and while another trial was progressing, instituted such investigation, through the aid of medical men and others who were acquainted with the prisoner, his past history and habits, as induced the belief with

me and my learned associate that he was in a suitable condition to be tried.

The law of this State (2 R. S. 697, § 2) prescribes that "No act done by a person in a state of insanity, can be punished as an offence; and no insane person can be tried, sentenced to any punishment or punished for any crime or offence while he continues in that state."

Had my associate or myself believed that the prisoner at the bar was in the condition of one whose trial is inhibited by this section of the statute, we certainly should have saved the Court, the jury, and the counsel the labor of a protracted investigation, that resulted in a verdict of sanity. And I doubt not, our learned adversaries will give us credit for believing, not only that the prisoner is *now* sane, but that he *was* so when he committed the horrid crimes that convulsed a neighborhood, by striking from existence a number of its most respected citizens. Yea, gentlemen, solemn and awful as these murders are to dwell upon, their terror sinks into insignificance in comparison with the thought of hanging a *maniac*. God has stamped the maniac with irresponsibility. Our law has recognized the mark, and I trust you will not believe that the public prosecutors would urge this miserable man to trial, in violation of law, and against the common dictates of humanity. We believe the jury that pronounced the prisoner sane was composed of honest men. We believe the court that approvingly received their verdict was also honest. Believing thus, and knowing that most of the evidence upon which the prisoner's counsel rely to establish the prisoner's insanity, has arisen from conversations with him since the commission of his crimes, and since his imprisonment under charge of them—conversations in which the prisoner is himself the principal *actor*, if not the *author* of the disease imputed to him—it seems to me, we would be wanting in fidelity to the public, whose duties we have been delegated to perform, should we refrain from pursuing, with proper diligence, the prosecution of this criminal.

Gentlemen, I am willing to concede honesty to the prisoner's counsel in believing that their client is insane. But in making this concession, I must be allowed to differ with them in judgment of the facts upon which they arrive at such conclusion.

From what I have already said of the prisoner, you must have inferred that he was never in a situation to have obtained much knowledge. On the part of the prosecution we concede that he is an *unlearned, ignorant, stupid and degraded negro*. With this concession, we will not claim for him the power of feigning insanity or any of its appearances, so as to deceive those who have known him and been familiar with his history and habits. Yet, gentlemen, you will readily perceive what inducements a man has, charged with a crime like this, to affect a disease which has become the common defence of murderers. And I apprehend you will have learned before the close of this trial, how men of *learning* and of

science may be deceived by converting natural imbecility and taciturnity into strong "*symptoms*" of mental derangement. In listening to the disquisitions of learned doctors of medicine and of mind, upon the *symptoms* of insanity, within the last few weeks, I have at times been almost led to exclaim, in the language of Festus to Paul, "Thou art beside thyself; much learning doth make thee mad."

Gentlemen of the jury, the main question you will be required to decide will be the insanity of the prisoner at the time the murder was committed. I might, perhaps, assume that it will scarcely be questioned by his counsel that he took the life of the deceased at the time and in the manner described in the indictment, and as I have already, in substance, related. It will, however, be necessary first to prove the crime, and that the prisoner committed it. As we shall proceed with this proof you will discover that the perpetrator must have possessed memory, sagacity, judgment and all the common attributes of mind. There are certain principles established by the sages of the law and sanctioned by the bench for ages, by which criminals have been tried. I will here briefly advert to them and give the Court reference to the authorities:

The District-Attorney quoted from Blackstone and the older English books; the trials of Lord Ferrers 19 Howel's St. Tr. 947; Arnold, 16 Id. 764; Parker, Coll. 477; Bowler, Id. 673; Bellingham, Id. 636; Hadfield, Id. 480, and the test of insanity now the law of both England and the United States, as laid down in McNaughton's Case, viz: That before the plea of insanity should be allowed, *undoubted* evidence ought to be adduced, that the accused was of diseased mind, and that at the time he committed the act, he was not conscious of right and wrong.

Gentlemen, I have thus alluded to the fixed and settled principles of law incident to all criminal trials upon an issue like this; more fully perhaps, than was necessary for the purposes of this case. If so, my apology is, that my acquaintance with this cause, arising from the trial of the preliminary issue, together with the cause of Wyatt which has just preceded it, in which the same defence was interposed, has instructed me that these established maxims, which have for ages governed criminal trials in the country from which we have derived our laws, and which have been sanctioned and upheld by our own tribunals, and which have thus far preserved society and punished crime, are now sought to be overruled; not by learned judges, not by the sages of the legal profession, but by the new light of our learned adversaries, with the help of learned Doctors of Medicine, and speculative Theorists, upon the various and multifarious divisions of insanity. When we shall have proved to you the commission of this crime and fixed the prisoner as the perpetrator, instead of allowing you, as the law directs, to imply that malice prompted it, you will be told by his learned counsel and his body of learned doctors, that no motive has been proved for the shedding of so much blood, and that in the

absence of such proof you are to regard the horrid deed itself as the strongest evidence that it was the work of a maniac.

Such doctrine, gentlemen, has been inculcated in this court by the prisoner's counsel, and, it is fair to presume, will be advanced again upon the present trial. It is proper that I should caution you against the adoption of such heresy to the law. I can in no way better expose the fallacy of such positions than by quoting the language of a doctor of insanity, which will be used by the prisoner's counsel, and the commentaries of an author upon Medical Jurisprudence.

"These acts are without motive. They are in opposition to all human motives. A man murders his wife and children, known to have been tenderly attached to them. A mother destroys her infant. It is hereby assumed or implied, that sane men never commit a crime without an apparent motive; and that an insane person never has a motive, or one of a delusive nature only, in the perpetration of a criminal act. If these positions were true, it would be very easy to distinguish a sane from an insane criminal; but the rule wholly fails in practice. In the first place, the *non-discovery* is here taken as a proof of the *non-existence* of a motive, while it is understood that motives may exist for many atrocious criminal acts, without our being able to discover them; a fact proved by the numerous recorded confessions of criminals before execution, in cases where, until these confessions had been made, no motive for the perpetration of the crimes had appeared to the acutest mind. It is clear, that if before inquiring into the perpetration of a murder, the law were to search for motives and rest the responsibility of an accused party upon the accidental discovery of what ought to be deemed a reasonable motive, many most atrocious criminals would necessarily go unpunished and some lunatics be executed. Besides, if one accused person is to derive benefit from an apparent absence of motive, there is no reason why the same benefit should not be extended to all who are charged with crimes. In the case of Courvoisier, who was convicted of the murder of Lord William Russell, in June, 1840, it was the reliance upon this fallacious criterion before the secret proofs of guilt accidentally came out, that led many to believe he could not have committed the crime; and the 'absence of motive' was urged by his counsel as the strongest proof of the man's innocence. It was ingeniously contended 'that the most trifling action of human life had its spring from some motive or other.' This is undoubtedly true, but it is not always in the power of a man untainted with crime, to detect and unravel the motives which influence criminals in the perpetration of murder. No reasonable motive was ever discovered for the atrocious murders and mutilations perpetrated by Greenacre and Good. Yet these persons were very properly made responsible for their crimes. On the trial of Francis, for shooting at the Queen, the main ground of defence was, that the prisoner had no motive for the act, and therefore was irresponsible; but he

was convicted. It is difficult to comprehend under what circumstances any motive for such an act as this could exist; and therefore the admission of such a defence would have been like laying down the rule, that the evidence of the perpetration of so heinous a crime should in all cases be taken as proof of irresponsibility! Crimes have been sometimes committed without any apparent motive by sane individuals, who were at the time perfectly aware of the criminality of their conduct. No mark of insanity or delusion could be discovered about them, and they had nothing to say in their defence. They have been very properly held responsible. On the other hand, lunatics, confined in a lunatic asylum, have been known to be influenced by motives in the perpetration of crimes. Thus they have often murdered their keepers out of revenge for ill treatment which they had experienced at their hands. See the case of the Queen v. Farmer, York Spring Assizes, 1837. This man was acquitted as insane, while the clear motive for the homicide was revenge and ill feeling." (Taylor's Med. Jurisprudence, 515.)

Thus you see, gentlemen, that this is not the first time that such fallacies have been urged in a court of justice. Yet, notwithstanding their exposure, they are to be here urged again upon you and upon this Court—with what effect, your own good sense must ultimately determine. I may add, that if such fallacies shall obtain with jurors, we may bid adieu to all hopes of punishing the atrocious crime of murder, until some new discoveries in science shall enable the learned doctors to enter the murderer's heart or analyze his mind, and discover the influences by which it is operated.

Gentlemen, you are to receive lessons upon the subject of insanity, in the course of this prisoner's defence, which doubtless will appear to you, as they have appeared to us, not only as strange innovations upon the law, but which expose the singular vagaries of the human mind—lessons which, if fully imbibed and thoroughly established, would not only acquit this prisoner of his present crimes, and pardon him for his past offences, but which would open your prison doors to their present inmates, and close them against future culprits. Witnesses, learned witnesses, in behalf of this prisoner, will swear that crime itself, where no motive can be discovered, is an invariable "symptom" of insanity. You will by them, with the aid of the prisoner's counsel, be instructed in the various classifications and divisions that science, upon a careful analysis, has made of mania. You will learn the complicated character of the disease with which this distinguished patient is afflicted, and the different types it has assumed during his career of crime. You will learn that he was first afflicted with what his scientific witnesses denominate cleptomania, a madness that induced stealing, and which, by its strange infatuation, carried him in a regular gradation of crime from the hen-roost to the peddler's cart, and thence to the horse stable, and which could only be relieved by a *prescription* from a court of justice, which for five years reduced his circulation by confinement within the walls of a State Prison.

During this period it will be claimed for him that he underwent a change; not only a physical and mental, but a maniacal change; that while laboring for the State and brooding over his misfortunes, or his faults, he not only received an injury upon his head which affected his brain, but that he contracted a strange "*delusion*," which he brought from the prison, that he was entitled to pay for his five years' services, and hence became a "monomaniac" upon the subject of his pay; that, failing to obtain payment at the office of the prison agent, the *delusion* carried him to justices' offices for warrants to prosecute the person whose property he had stolen, and who caused his imprisonment.

This form of his disease increased with his disappointment, until it armed him with the instruments of death, and led him to the destruction of one of the most respected and beloved families in the community. This family slaughter is made the evidence that the prisoner's disease assumed another type, and he became a homicidal monomaniac.

Gentlemen, you would naturally here suppose that he had already evinced insanity enough, upon the theory of his counsel, to excuse a dozen culprits. But his apologists will not stop here. Shortly after he was lodged in jail upon the charge contained in the indictment, it was discovered by those who deeply sympathized with the prisoner in his misfortunes, that dementia, the very last and fatal stage of insanity, the climax and ultimatum of all the varied forms of mania, had commenced its ravages upon his miserable system. Such, gentlemen, is an outline of the theory with which they will attempt to connect the history and crimes of this prisoner. I shall not attempt to detail to you the evidence with which they will attempt to fill up this sketch. It will be sufficient here that I glance hastily at the prominent features of it, and refer briefly to the evidence by which we shall attempt to rebut their ingenious theory, and hold this distinguished culprit responsible for the blood of our esteemed citizens, in which he has so deeply imbrued his hands.

First, they will attempt to show that there was something singular in the change he underwent from the age of seventeen to twenty-two. Gentlemen, you have doubtless been sufficiently close observers of mankind to have learned that the natural vivacity of the *boy* is lost in the more staid and sober habits of the *man*. And when you add to this, the fact that the prison convict is cut off from society and social intercourse, you will naturally infer that he might lose a portion of his social qualities. If, therefore, the prisoner underwent a *change* during the period of his five years' confinement, and at a time of life when a change takes place in every mortal, your own good sense, in the absence of all proof, would enable you to determine whether such change was natural or unnatural. But, in addition to this, we shall show you by witnesses who have known him from early boyhood, that *time* has

effected no change in him beyond the change that under like circumstances is common to his species.

Again, they will attempt to show you, that while in prison he received an injury upon his head that resulted in deafness, and may have terminated in a disorder of the brain. In answer to this, we shall prove to you that his deafness preceded the blow upon the head; that that blow was called upon himself by disobedience or an insurrectionary movement, and was inflicted in a manner that could have resulted in no essential injury.

The notion he entertained that he was entitled to pay for his services, we have once shown, by a former chaplain of the prison, and shall again if we shall be able to obtain his attendance, instead of being an "*insane delusion*," was a notion somewhat common to the ignorant inmates of that institution.

I have already commented upon the fallacy of attempting to fathom the motives of a criminal for the perpetration of a murder. But we shall prove that the prisoner, when a boy, shortly before he was sentenced to State Prison, resided upon the premises where these murders were committed, and in a log hut a few feet from the dwelling of the deceased; that he was acquainted with the family and must have known them to possess a degree of affluence; that he was at the house about a week previous to the fatal deed; and shall submit it to you to determine whether his object was *plunder*, or whether he took refuge in some *fancied wrong*, and sallied forth with ample preparations to seek revenge upon society. It matters not what may have been his motive nor whether we discover any; for if, in the language of the law I have read to you, "he had sufficient capacity to form a design and know its consequences," the law holds him responsible for his crimes, and no fancied injury can shield him from its consequences.

Gentlemen of the jury, after the counsel for the prisoner shall have collected all the trifling circumstances from which an inference might be drawn that he has been afflicted with, or predisposed to, any of the forms of mania, men of science, and I doubt not of skill, will be called from the Insane Asylum and other institutions of learning, who have visited and conversed with the prisoner in his cell, and introduced to prove him in a state of absolute and irrecoverable dementia. Gentlemen, I hope I do not undervalue learning, nor would I depreciate in your estimation the value of science, and of skill, and of experience, in determining the true character of any disease that those attainments can discover. But in view of what has transpired in this court and of what we have every reason to apprehend may again occur upon this trial, I do feel called upon to caution you against receiving the dogmas of men, learned or unlearned, in violation of the plain principles of common sense. How many patients, think you, are there within the pale of our lunatic asylums, whose insanity was not discovered before their keepers knew them? Insanity, unless occasioned by some sudden injury, is generally if not always preceded by some

marked change, altering the habits or conduct of the patient, and which alteration is as readily discovered by a man of ordinary astuteness and sense as by the man of-extensive learning, and more likely to be first discovered by the most intimate friends and acquaintances of the diseased. I am willing to concede that science and skill, with the aid of experience, often trace out the causes of disease, and alleviate the sufferer. But I am unwilling to concede that vast learning is necessary in detecting the mental aberrations of our intimate acquaintances. Who that has ever watched by the side of a friend afflicted with occasional delirium, but has discovered the first wanderings of mind? Think not, gentlemen, that I desire to prejudice your minds against the learned men who will be called in to aid this defence. I am sure that I respect them, and believe that I fully appreciate their merits and their skill. All I desire is, that the law shall be upheld; not only the law that defines and affixes a penalty to crime, but the law that governs the testimony of experts. The law allows no witness, skilled in science or in art, to give an opinion, without at the same time requiring him to give the reasons upon which that opinion is founded. Why is this? It is to guard against *empirics*, and to test the value of opinions, by subjecting the facts upon which they are based to the analysis of juror's judgments. Hence I say, gentlemen, should any medical witness give an opinion which may not be well founded upon the facts from which he derives it, it will become your duty to look carefully at the facts and determine for yourselves his knowledge, or his empiricism, according to the merits of his opinion. I doubt not that my respect for medical witnesses upon a trial like this, is full as great as that of our adversaries. It is natural that we should all respect most those opinions that concur with ours. I am free to acknowledge that I have very little regard for that opinion, that science, or that skill, or whatever you may please to call it, which makes a particular crime a "symptom" of a particular mania—or any crime more a "symptom" of insanity than of depravity. In what I have already said, I trust you will have discovered the fallacy of such positions.

We are all aware that in physiology different theories have followed each other in rapid succession; and we know not, from the doctrines of the schools to-day, what they may be to-morrow. And whatever they are now, liable as they are to fluctuate, we cannot be too cautious in incorporating them into the law of the land.

The different conclusions at which witnesses have arrived, and the different opinions they will express with regard to the mental capacity and intellectual soundness of the prisoner, you will ascertain from their testimony, are the results of the different modes of testing it. One thinks that the prisoner supposes he can read, but finding he cannot, makes this inability evidence of insanity. If all are insane who know less, or who can do less than they had supposed, who could number the crazy? Another, in conversing with him, asks him who God is. He answers, a Being above. He

asks further, "What is He like?" He answers, or the "best he could gather from his answer was" that He is "like a man;" and from this dialogue he thinks him crazy or an idiot. If this is a true test, shall we pronounce all who look upward in their addresses to the Deity, and all who believe that "man was created in the image of his Maker," insane? If this learned catechiser, when upon the stand, shall fail to give a better definition of the Deity, we trust you will not pronounce him insane.

Such are some of the tests that have been applied by the prisoner's witnesses to ascertain his sanity, and from such results they call him a fool; while others have thought the best way to test his knowledge was by observing him in his daily life and different vocations, noting his actions, and his capacity to perform different kinds of labor with success, and by conversing with him upon subjects upon which he may fairly be supposed, from his condition in life and from the manner in which he was raised, to have some knowledge.

In answer to all that may be adduced in the prisoner's behalf, with a view to show that he is a demented being, we shall prove to you that his memory is such that he readily recalls to mind all the occurrences of his life. We shall test the accuracy of his recollection by those who have been familiar with his history. We will prove that he answers readily all questions that he is made to understand, in relation to subjects of which he has acquired any knowledge; that his looks, appearance and actions are, as near as may be in any individual, what they were before he entered the State Prison; that his attitude and the expression of his countenance are the same, and both hereditary; that his health has been, and still is, good; that his appetite is good; that no change is discoverable, either mentally or physically, by those who were best acquainted with him; that his moroseness is natural to him, and, you will observe, is a trait in the natural character of his maternal ancestry; that in the concealment of his instruments of death, he manifested a criminal intent; that in their preparation, and in the execution of his design, he manifested sagacity, judgment, will, and all the common attributes of mind; that in the time he chose for the perpetration of his crime, and in his flight, he sought concealment, and manifested what he subsequently confessed, a consciousness of the wrong he had committed. We will prove by medical men, some of whom have known him from boyhood, that they discover in him no change, uncommon to others, in passing along with the same period of time, and nothing that indicates insanity in any of its forms. And upon such proof, aided by science, and by sense, we shall rely for a conviction of the prisoner.

In opposition to all this, you will be told, by witnesses who have never known him till since the commencement of the present term of this court, and who have attempted to converse with this unlettered and ignorant negro upon theology, physiology, moral philosophy, and those higher branches that pertain more appropriately

to the schools than the cell or the cabin, that, in their judgment, he is in such a state of dementia as to be unconscious of the commission of a crime. They are willing to believe the prisoner honest in all he says, save in the confession that his murderous deeds were wrong.

I have hinted, gentlemen, at the prominent features of the case sufficiently for you to understand and appreciate the evidence to be adduced. I should say no more but for what has fallen from the prisoner's counsel during the progress of empanneling this jury. They have insisted that a fair and impartial trial cannot be had in this county; that the public mind is so enraged at the prisoner's horrid crimes, that the good sense and sober judgment of our citizens are paralyzed. And to illustrate this assumed position, and as if to censure the Court and the prosecution, in a reasonable effort to obtain a jury, upon the trial of the simple question of a juror's indifference, they have stepped aside to portray in fancied colors, the excitement of the public upon the arrest of their offending client.

Gentlemen, I am willing to concede that some excitement, yea, even that great excitement did exist. Nor am I certain that I would like a residence in the community, if such an one there is, that would not manifest excitement, even great excitement, when four cold-blooded murders are perpetrated in its very heart. The society that has been robbed in numbers of its brightest ornaments; the neighborhood called to mourn over the lifeless bodies of its most beloved family, with every corse exhibiting the marks of the assassin's knife, that would not be excited, must be bereft of all sympathy, and of the common feelings of humanity.

Yes, gentlemen, the public was excited! Society was convulsed! But that excitement has subsided, and sunk into a quiet grief that still lives, and must long live, to wet with its tears the turf now growing upon the common grave of a venerated mother, a kind husband, an affectionate wife, and a lovely child, whose corpses are now mingling with the sepulchral ashes of the dead.

While you are called upon to perform the most solemn duty of your lives, I will not ask you to forget the dead, whose virtues daily call up the tenderest emotions of the living, for I should be asking more than any one who may sit in judgment upon the offender can do. I cannot ask you to forget considerations that are due to society and to humanity. But, gentlemen, if any of you shall have imbibed prejudices against the prisoner, I call on you respectively to eradicate them now. If you have any worse feelings than of pity and compassion for this miserable culprit, and if you have any desire but to arrive at the truth in the investigation of this charge, I call on you, for his sake and for yours, for the sake of justice to him and to yourselves, justice both temporal and eternal, to drive them from your minds. The people do not seek the blood of the innocent; public justice does not demand it; nor shall you, with the consent of the prosecution, become the instruments of shedding it. No;

and notwithstanding the public excitement to which counsel have so often alluded, and which has doubtless existed to a great extent, I am more ready to hope, and more willing to believe, that you will acquit than convict the prisoner, unless his conviction, in view of all the facts, shall be required by impartial justice and the stern demands of law.

Gentlemen, much has been said by the prisoner's counsel about the verdict of the jury upon the trial of the preliminary issue. The jury who rendered that verdict, and the Court that received it, have both been arraigned by his counsel, and in your presence have received his censure. This, gentlemen, I regret. I can readily overlook, and forget, and forgive all that has been said and hinted against the prosecution. Whatever has fallen from counsel that savored of severity or unkindness, has been regarded as the ebullition of uncommon zeal, warmed into being by a cause of unusual magnitude, and has fallen harmless at our feet. But so far as the integrity of the jury that rendered that verdict, and the impartiality of the court that received it, have been questioned by the counsel, I deeply regret his course. I have referred to the law that governs the Court when the plea of insanity is interposed preliminary to a trial upon an indictment. There is no particular manner in which the Court is bound to test the question. It is sufficient that the Court, in any of the modes prescribed, satisfies itself of the prisoner's present sanity. In this case the mode was taken deemed most advisable by the Court, and which was the choice of the prisoner's counsel. The result of that trial, patiently and impartially conducted for two weeks, satisfied the Court that the accused was in a suitable condition to be tried for his offense. With that the counsel should have been content. We claim not for that verdict that it should influence you in the one you are to render. We claim for it no merit but that of determining that the prisoner is in a suitable condition to be tried upon the indictment preferred against him.

Gentlemen, I have warned you against the indulgence of prejudice towards the prisoner. I have no fears that anything counsel may have said has created any against the Court or the prosecution.

THE WITNESSES FOR THE PEOPLE.

Dr. Joseph T. Pitney: Am a physician in Auburn. On the night of 12th March at the house of John G. Van Nest, in Fleming, about three miles from here, I arrived a little after midnight. Found John G. Van Nest, Mrs. Van Nest and a little boy, their son, lying dead in the house; also a man, Van

Arsdale, wounded, and Mrs. Wyckoff, the mother of Mrs. Van Nest, at Mrs. Brooks', near by, also wounded. Van Arsdale's wound was inflicted with a knife just above the heart. Mrs. Van Nest had been stabbed in the stomach—she was enclente. The boy was wounded through the abdomen. Van Nest

had also been stabbed near the heart. Mrs. Wyckoff died on the following Saturday. I made a post-mortem of John G. Van Nest—he must have expired instantly.

Cross-examined: Did not examine his pockets then. At the post-mortem I took from his pocket a wallet which contained about nineteen dollars, with some silver coin and a watch.

Robert Simpson: Am a turner and chair-maker in Auburn. A day or two before the murder prisoner came to my shop and wanted me to grind a knife for him. I told him I had not time but would put the belt on the wheel so that he could grind it himself, which he did. The knife is the same one. He rubbed it upon an oil-stone, took out three cents and laid them on the work-bench and went out. Recognize the handle as one I turned out for Hyatt, a blacksmith. Next morning prisoner came into my shop with a large hickory club; he took up a brace and bit, put the club in the vise and went to boring in the end of it; he seemed to be fitting something into the end of the club that I could not see. He went out, came back and asked me if I had a larger bit; got him a larger one with which he went to boring.

Dr. Samuel Gilmore: Am a physician in Fleming; assisted Dr. Pitney in the post-mortem. (He corroborated Dr. Pitney.)

George W. Hyatt: Am a blacksmith and manufactured the knife before me; sold it to prisoner on Monday before the murders; showed him four or five knives. He selected one;

told him the price was three shillings. He asked me if I could afford it for one and sixpence; told him I couldn't afford it for that, but he might have it for that price. Said he wanted a handle put on. I put one on. Something was said about a ferrule; told him it wouldn't split without one. He wanted I should grind it; he turned the grind-stone and I held the knife. After grinding it I gave him the knife, but he ground it more for himself. He went away and returned in two hours. He had a large jack-knife and wanted me to put the blade into it. He asked me what I would charge; told him sixpence. I made the rivet, he finished it. He paid me sixpence and I gave him three cents back. Noticed that he was hard of hearing. Saw him in jail three or four weeks after; asked him if he knew me, but he made no answer. He leaned forward and said he couldn't hear; he was deaf.

Joseph Morris: Am a blacksmith. About a week before the murder prisoner came in and asked me if I would make him a knife. Asked him if he wanted a knife to stick hogs; he said that was not the kind. Told him he had better whittle out a pattern of the knife he wanted; he said he would go and whittle out a pattern; was gone twenty minutes and returned with one. Asked him what kind of steel he wanted it made of. He asked what I would charge to make it out of good cast steel; told him four shillings. He said I could afford to make it for two shill-

ings. Finally said he would give four shillings if I would grind it and put a handle to it. I said, "What do you want to do with the knife, you want to kill somebody, don't you?" He said, "It is none of your business so long as you get your pay for it."

Cross-examined: One of my boys told me he was deaf and I must speak loud to him; I talked louder to him than ordinarily. I scribed out a sticking knife; he said that was not the kind he wanted. I said to Thomas, "I guess this negro is going to kill somebody."

Joseph W. Quincy: Am a barber. Prisoner, the week of the murder, came to my shop and wanted his whiskers shaved off; told him I couldn't shave colored people.

Peter W. Williamson: I spent the evening at Van Nest's until half after nine the night of the murder. Van Nest and Van Arsdale were in the sitting-room when I left. When I had got about one hundred rods from the house, heard the dog bark very fierce, then I heard some one halloo or shriek. Three-quarters of a mile from Van Nest's heard some one coming behind me on a horse. Saw a negro or a man disguised as a negro. He had no saddle, all he had to guide the horse with was a halter. The horse was Mrs. Wyckoff's. Went back to the house and found the crowd there and saw the bodies.

William H. Brooks: On the night of the murders as I was coming to Auburn saw Mrs. Wyckoff's horse lying down beyond New Guinea. The horse

was muddy; saw blood on the halter but not on the horse.

Harrison Masten: Found the horse near New Guinea. He was muddy on the left side and appeared to have fallen at the sluice-way.

William B. Patten: The night of the murder came past Van Nest's house a little after nine. Met Freeman half way to Brooks' house. I was in a cutter but he was on foot. He had something under his coat and on his arm which supposed was a gun. As I passed Van Nest's house noticed a light there and saw persons moving by the window.

Nathaniel Hersey: Knew Freeman; he had butcher knives before the murder; didn't tell me what he was going to do with them. He also had a couple of old knives about a week before the murder. He said he meant to kill John De Puy because he went around and told them not to let him have liquor. He had found the folks that put him in prison and he meant to kill them because they put him in prison. He said they were Van Nests. Said John De Puy turned him out doors when he worked at Port Byron because he would not give him his money.

Cross-examined: When he worked for Dr. Hamilton about seven years ago he was a lively, smart boy; he laughed and played and was good natured. I thought he could understand as much as anybody. He heard well and could tell a story right off. He didn't talk a great deal unless some one spoke to him or he was playing, but

then he talked like other folks. Saw him in prison; he held his head down; his hearing was pretty hard; he appeared quite stupid. Asked him what ailed him, he said he was deaf, that they rapped him on the head at the prison. Mr. Bostwick asked me on the examination whether I had heard Freeman threaten Van Nest and I said I didn't hear him threaten him. Told Mr. Stephen Titus the same night that Freeman said he was going to kill John De Puy and he said he was going to kill Van Nest.

Thomas F. Munroe: Am a police officer; knew Freeman when a boy; he was quick and active and not much different from other black boys.

Helen Holmes: Lived at John G. Van Nest's. Mr. Williamson was there that evening. I retired before he left. First knowledge I had of the assassination was the shriek of Mrs. Van Nest in the yard; then I heard the dog bark; went into the north front room. Mrs. Wyckoff got up and went out into the hall. Soon after I heard a noise indicating scuffling. I passed into the kitchen; saw Mr. Van Nest lying on his face upon the floor with one foot on the steps leading to the kitchen. He was dead. As I came into the sitting-room saw a negro looking through the front window. Have seen him in court since. The prisoner is the person.

About a week before saw the same negro at Van Nest's house. He said: "Do you want to hire a man?" Mr. Van Nest replied that he did not, that he

had a man engaged and asked the prisoner if he lived in Auburn. Prisoner said he was staying around there and had no work. Mr. Van Nest told him perhaps he could get work further up the lake. Saw nothing indicating that the prisoner was crazy.

Cornelius Van Arsdale: Was at Van Nest's the day of the murder. After I had been in bed four or five minutes heard a woman shriek. In about a minute heard Mr. Van Nest ask, "What do you want here in the house?" Next heard something fall heavy on the floor, heard the door open. Some one spoke and asked if there was a man up there; rose up and said there was. Beheld a negro with a butcher-knife coming up the stairs. He stabbed me in the breast but the knife glanced off. I pushed him back and he fell down stairs. Had a candle-stick in his left hand which I wrested from him and with which I struck him. At the bottom of the stairs found a broom-stick which I seized and with which I struck him several times. He made a quick retreat out of the front door of the sitting-room and I closed the door. Mrs. Wyckoff was on the last step of the hall door steps. Said to her she had better come in the house, but she went on towards the gate; and at or near the gate she came up to the negro and there they had a short scuffle. I saw her strike at him but saw nothing in her hand. He had hold of one of her arms with his hand. Miss Holmes came in and said the negro was

looking through the window; told her to step one side so that he couldn't see her. He was then looking in at the south front window. Saw in his hand what I then supposed to be a gun. He then kicked the door open and went to and looked in at the north window. Helen asked if she could go and alarm some of the neighbors; I told her to do so. When I went into the bedroom Mrs. Van Nest was alive but speechless. She died before I left the room. Prisoner is the negro who stabbed me.

Cross-examined: Van Nest was generally at home unless he had business away. He was domestic, sedate and a grave man. Never heard of Freeman before the day the murder was committed. Don't know as there was any money in the house. Saw the prisoner an hour that Saturday; saw nothing to make me believe he was crazy.

Frederick Bennett: I reside south of Auburn. Recollect a man named De Puy was there at Wyckoff's farm in 1838 and a boy living there with him named William Freeman. Thought he was not a very active boy. Didn't notice whether or not he was playful.

James Amos: On the thirteenth of last March saw prisoner at Schroepel. He asked me if I wanted to trade horses. It was a gray horse and had on a plaid blanket with white lining and surcingle. I told him, no. He then asked if I wanted to buy a horse. I told him, no. He then went around the sleigh to Corning, Wallis and Brund-

age, who were there and offered the horse to Edwin Corning for eighty dollars. He finally told Corning he would take fifty dollars for the horse. Corning asked if I knew him. Told him I had seen him but couldn't call him by name. Corning then said, "Where did you get the horse?" He said he had a horse given to him and he had traded round and got this one. Corning then said, "I guess you stole the horse." The by-standers then said, "I guess he did, too." The prisoner said he hadn't stolen him. Corning then remarked, "Amos, you better stop him—he shouldn't go any further if I lived here." Others said the same. Corning had hold of the halter and the negro told him to let go. Wallis and Brundage then took hold of it also. Freeman had hold of the halter and jerked one way, and the others jerked the other way. The negro then kicked Wallis and Brundage. They asked me to detain the man. I told him I had suspicion that it wasn't his horse. He said it was—that he had a horse given him and had traded round and got this one. I said, "I see you've got your hand hurt, how did you do it?" He said he got it hurt but didn't tell me how. Did not discover that he was hard of hearing. He said, "It's my horse and you know me." Said his name was Bill Freeman. He then told me he husked corn last fall for me; I then remembered him. Asked him whether he hadn't been in a fight and hurt his hand. He said he hadn't. Told him that I didn't think he came honestly

by the horse. He said he could satisfy me by the De Puys. I got some boys to go down to De Puy's and fetch them up. He tried to have me let go of the horse and said he wished to go along; I refused to let go; he got a little wrathful and kicked me and I had considerable of a tussle with him. Then made up my mind to take the horse from him; took hold of his thumb and pried it back. During the scuffle he told me if he had a knife he would gut me. I took hold of his collar and he kicked me, but I dragged him along. He tripped me up once and I fell on one knee.

When DePuy came I showed him the horse and asked him if Freeman ever owned such a horse. He said he guessed he couldn't own such an one. Told me that Freeman had stopped there as he came along and that they drove him off, suspecting he had stolen the horse. I got a warrant from Squire Burke and arrested him. Discovered no deafness in him then. Asked him if he wanted some supper—he said he did. Told Gregg the landlord, to get him some supper. Taylor came in and asked him if his name was Freeman. Prisoner made no reply. Taylor called him a damned murderer and said that if he had a gun he would blow his brains out. Taylor then told us of the murder of the Van Nest family. Freeman said nothing in reply. Taylor threw out some chains with which he was going to bind him. He waited till he got through eating and then he bound him and

took Freeman out of my custody.

Cross-examined: Was struck with astonishment when Taylor said he had murdered a whole family. He spoke loud and sharp, but the negro sat at the table and ate his supper. He seemed startled, yet raised his fork and continued eating. Taylor afterwards searched his clothes, his pockets and his boots. He found one cent. The prisoner said nothing. I think he acknowledged stealing the horse. Saw in him no symptoms of insanity.

Alonzo Taylor: Am a constable. Found Freeman at Gregg's tavern, eating supper about five o'clock in the afternoon of Friday. Called him a damned black scoundrel and accused him of murder. He said, "I don't know anything about it. They've got the horse." He said the other horse fell and he left it. After that, couldn't get anything more out of him. Coaxed him to tell me about the murder, and why he killed the child. He said he didn't know it was a child. Herrick and Parker took him into another room. Was called in, and he grumbled about their cuffing him. He said, "I don't like the treatment; they are cuffing and beating me." Nobody succeeded in getting anything from him further. He complained of being deaf, but Parker and Herrick said they hadn't hurt him. I brought the horse along. It was Burrington's. Freeman said he got the horse east of Auburn.

Cross-examined: I told him that he was a black, infernal,

scoundrel. Bill rolled up his eyes and laughed while he was eating. Said he knew nothing about the murder. I said, "You black rascal, you do." He smiled and I drew my cane to strike him. They said, "Don't." He said nothing more to me.

Mrs. Van Nest: Am the mother of John G. Van Nest. The night my son was killed saw a black man in the yard of our house about eight or nine o'clock. He turned and went away towards my son's. John was forty-one years old and was married about ten years ago. He was very steady, grave and reserved. Was never away from home except on business. Never had any enemies in the world. Was Justice of the Peace but held no office in the church.

George Burrington: I lost a gray mare the night of the murder and found her at Baldwinville. Freeman had looked at her about a week before as he passed me in the street.

George B. Parker: Three-quarters of an hour after I heard of these deaths, went to Gregg's and saw the prisoner; had conversation with him there. Walter D. Herrick was also there. Asked how his hand was cut; he answered that he had a knife and was whittling there. Asked where the knife was; said he left it in the yard there. Asked him where he stayed the night before, and he said along the road there somewhere. Asked him what place he came through before he reached here; said he came to Phoenix through Syracuse at about five o'clock and there was

some lights there. Asked him what place he came through before he came to Syracuse; he said he came through Nine Mile Creek. Asked him what place before Nine Mile Creek; he said he believed they called it Elbridge; asked him what place before Elbridge, if it was Senett; he said, "I shan't answer any more; if they can prove anything against me, let them prove it." Asked him why he murdered the child; he said he didn't know there was a child there. I pushed very hard for the reasons he had against Van Nest. He said, "I suppose you know I've been in State Prison five years. I was put there innocently. I've been whipped and knocked and abused and made deaf. There won't anybody pay me for it."

Couldn't get him to admit he'd killed anybody. Boxed his ears and he called for the constable. My feelings got the better of my judgment and I pulled his hair a little. He spoke to the constable and asked if he suffered persons under his charge to be cuffed in that way. Taylor said he guessed he wasn't hurt. Saw no signs of insanity; thought he'd played a very strong game and seemed to rely upon silence for his fortification.

Cross-examined: He said, "There wouldn't anybody pay me," that he was put in prison for stealing a horse. Asked whether Van Nest had anything to do with putting him there; he said, "I don't know anything about Van Nest." Asked if the DePuys were his accomplices;

he said he didn't know anything about it.

Augustus Pettibone: I am Sheriff of Cayuga county. Saw prisoner the day he was brought into jail. Warden asked him what he killed those people for? He said, "They swore me into prison." Warden told him it was another family. He said, "Was it?"

Dr. Leander B. Bigelow: Am a physician. Have visited prisoner several times in jail to ascertain the state of his mind. Inquired how he prepared and what he used in killing this family. He said with a knife, "Got it of a blacksmith right down there by the Exchange." Said he had a knife in a club. "I fixed that up by the big dam at a shop." He said he bought two knives and they didn't suit him; took them up where he boarded and put one under the head of his bed and the other under the bed. At the time of the murder, he said he went up stairs and got his things and carried them down and hid them under the wood. Said he went back into the house. Asked what he did in the house. He said, "Nothing, but stood around there and thought about it; didn't know what to do, but finally thought I'd go, anyhow." Asked how he carried the knife which he killed with. He put his hand to his breast, left side, and said, "In here." Next inquired who he killed first. He said Van Nest; asked what Van Nest said; he said, "He asked me what I wanted." Asked where, on his person, he stabbed Van Nest; he looked up, then cast down his eyes and

showed me, to the left of the breast bone. Asked how many he killed; he said five. Asked why he took the horse; he said, "Well, my wrist was cut and I thought I could go quicker." Asked if he did anything to the horse; he said yes, he stabbed him—he fell on him and hurt him. He then described accurately his wanderings until he was arrested.

Cross-examined: In January, 1844 or '45, he complained of ear-ache and I prescribed. He came again and complained of costiveness, I gave him a cathartic. Asked him in prison how old he was; he said twenty-one on the first of September. Asked how long he'd been in jail; he said about three months. Asked him the names of days of the week; he answered, Monday, Tuesday, Wednesday, Thursday, Friday, Saturday and hesitated; then said Sunday. Asked him how many weeks in a month; his answer was four. Asked how many hours in a day; he said twelve. Asked how many in a night; said twelve. Asked how many in both; he said twenty-four. Asked how many shillings in a dollar; he said eight. Asked how many cents in a dollar; he said one hundred. Asked him how many days there were in a year; he said, "I don't know exactly." Asked how many months there were in a year; he said twelve. Asked when he came out of prison; he said, "Twentieth of last September." Asked how long he was in prison; he said five years. Asked how many he killed; he said five. Asked whether they were

men, women or children; he said, two men, two women and one child." Asked whether he expected to be hung for it. He said, "I don't think anything of it." Asked what made him kill that family. He answered, "To see if I couldn't get revenge, or get some pay for being in State Prison about a horse; and I didn't do it." Examined his pulse and found it seventy-seven at the commencement, and at this stage it was eighty-one, as he was standing. I asked, "Why did you not kill the widow Godfrey first?" He said, "I got it in my head that I would go up that way first, and then go round there." Asked why he didn't go into the house. He said, "Because my hand was cut, and I couldn't think to go in and handle my hand." I asked, "Are you sorry you killed that little child?" He said, "I don't think much about it. I don't know but it was hard, it was little—I rather it was bigger." Asked, "Do you know it is not right to kill folks?" He replied, "I s'pose it ain't right to kill folks." Asked "Who was the keeper of the prison when you was there?" He said, "Captain Cook." Asked whether there

was any other keeper; his answer was, "Mr. Doubleday was keeper—there was another one." I asked, "What was the Keeper's name in the shop where you worked?" He said, "Captain Mills." Tuesday evening, 24th, I examined him again; he sat on his tub and held a candle. Asked what he killed the Van Nest family with, he said, a knife he got of a blacksmith, right by the Exchange. He said, "I went to the house—upstairs—got my things, hid them under the wood and went back into the house." I asked him who he killed first, he said, "Van Epps, I think they called him." I asked who next; he replied, "A woman, don't know who she was—saw her pass by the window." I asked who next; he said, "A little child lay on the bed; I killed him next." Asked who next; he said, "a man upstairs, but I didn't kill him, for I saw him afterwards." Saw nothing to satisfy me prisoner was insane. Find him a man of low, degraded intellect and of very limited knowledge. He is deaf in one ear and partially so in the other and can hear but few words that are addressed to him.

THE OPENING FOR THE DEFENSE

Mr. Wright. Gentlemen of the Jury: It now becomes the duty of those having charge of the defense to explain to the Court and jury the nature and grounds of that defense. And first, gentlemen, I may be permitted to speak in relation to the reasons of our appearing here as counsel, for we have been censured, and in no measured terms, by those who wish to be considered as good citizens, and worthy, and honest, and law-abiding men, for appearing at all in defending the prisoner. But not so have we learned our duty.

To us the prisoner was a stranger until after his incarceration

in yonder jail. His defense has not been sought for by any of us. My respected, learned, and most distinguished friend, who leads in this defense, engaged herein after frequent and urgent application by those who, as we think, honestly and firmly believed that when the fatal blows were given by the prisoner at the bar, he was bereft of that reason, the possession of which alone could render him amenable to this tribunal for his acts. And as regards myself, you well know, that the onerous and unpleasant task was imposed upon me by the Court, whose directions, in that respect, I was scarcely at liberty to decline. But I must, in justice to myself, say, gentlemen, that however much I may and do respect the authority of this Court, yet, whatever might have been the consequences to myself, I never would have consented to act as counsel for the prisoner in this case, had not my own mind been firmly, aye, beyond any reasonable doubt, convinced that the prisoner is not now, and was not at the time of the deaths of his victims, in any proper sense of the word, sane, or accountable, and that he, therefore, was not, and could not be guilty of murder. Although we appear here as counsel for the accused, and as such are bound to do all in our power to prevent an unjust or an illegal conviction, yet, gentlemen, we, too, are the fellow citizens of those who were so unexpectedly cut off from amongst us, and we cannot, nor need we deny, that we do feel our responsibility as citizens, whilst acting here in the capacity of counsel; and for myself I can most solemnly assert, that my duty as counsel in this case is not incompatible with my duty as a citizen, for I do most conscientiously believe, gentlemen, that the conviction of this man, (if man he can yet be called), by reason of public clamor, or public excitement, and contrary to the evidence which has been, and which shall be given in the cause, would be a much greater calamity to our common country than the death of those who have fallen by his insane hand.

And this, gentlemen, brings me to the defense interposed here. I need scarcely say to you, gentlemen, that the defense is insanity. And why have we interposed that defense? It is none of *our* work. It has not been got up by the ingenuity of counsel, for the purpose of saving the guilty from the effects of his crime. That defense was suggested by others, before any one of us was in any wise connected with the case.

Men, eminent in this branch of medical jurisprudence, men who were called to visit the jail in which the accused was confined without any reference to him or his offence, saw him there, and became satisfied that there was at least reason to doubt his sanity. Further examination convinced them that there was no doubt in the case, and hence, it became a duty which the citizens of this county owed to public justice, that that question should be examined; and I need hardly say to you *now*, that the further examination tended but to confirm the previous impressions, until that was but conjecture, became conviction.

You have been told by the learned gentleman who opened this

case on the part of the prosecution, that he, as also the learned and distinguished public functionary who leads in this prosecution, saw *at once*, upon their first interview with the prisoner, that there was no insanity in the case. We do not say either of those distinguished gentlemen have, in the least, mis-stated his impression; but we do say that others, quite as well qualified to judge upon that subject, and quite as likely to be impartial in their judgments, and correct in their conclusions, came to a very different conclusion, in which we fully coincided. And hence, gentlemen, we did interpose the plea of insanity; a plea which, although it may now and hereafter be, as it heretofore has been, ridiculed as the device of counsel on behalf of those who have no other defense, yet it is one, which, of all others, should, when honestly interposed, be treated with deference and respect, and examined with caution and without prejudice; a plea which, if false, is the most difficult to sustain, and, if true, should be the last to be disregarded.

But, gentlemen of the jury, this is no new plea; it is, and for centuries past has been, well known to the common law, and it is now also incorporated into and forms a part of the statute law of this state, which declares that, "No act done by a person in a state of insanity, can be punished as an offence; and no insane person can be tried, sentenced to any punishment, or punished for any crime or offence, while he continues in that state."

Hence, you will see, gentlemen, that it is not the plea itself which our opponents can make the subject of their ridicule, or, justly, of complaint. But, say they, it has already been tried and disproved. Disproved, indeed! and how, and when, and where? Was it when the accused was brought into court to hear the offence with which he was charged read to him, by the District Attorney? There were some who were convinced that he either did not hear, or that he could not understand the nature of those charges. That he heard, was evident; at least we will not presume that the prosecution would put a *sane* man upon trial for his life, without first, in some way, communicating to him full knowledge of the charge which he must meet; and if he did hear, he must certainly be either more or less than human, to have shown such stolid indifference. But let that pass, gentlemen. But, say the learned counsel opposed, that question has been passed upon and decided by the previous jury. That we deny; we deny that that jury, by their verdict, have passed upon the issue submitted to them. Look for one moment, gentlemen, at the verdict they have rendered. I will read it to you; they say, "We find the prisoner at the bar sufficiently sane in mind and memory to distinguish between right and wrong." And is that sanity? I will venture to assert, that there is no court claiming to act according to any civilized notions, that will so hold. At any rate, we do know that the courts of this state do not so hold. The lowest standard which is ever required in questions of this kind, is, that the accused shall be able to distinguish right from wrong in regard to the par-

ticular transaction in question. We tell you, gentlemen, that the finding of that jury is no verdict; and we shall treat it accordingly.

[*The Counsel* here referred to the motion which had been made to postpone this trial, and of the trouble and difficulty of obtaining the jury, &c., of the challenges to the jurors, and the result; and deprecated any unkind feelings which might have arisen in the minds of any of the jurors thereby; and expressed the hope that the accused should, at least, receive at their hands a patient hearing, and an impartial trial.]

The learned District Attorney has told us, that this is the most important trial that has occupied the courts of this country for the last half century. Indeed! Why so? There is no property at stake. The result cannot resuscitate or reanimate the forms of the slaughtered victims. Why, then, is this trial so very important? It certainly cannot be because the life of an "unlearned, ignorant, stupid, and degraded negro" depends upon it; the life of one who is by them conceded to be of very low intellect, indeed—scarcely above the brutes that perish. It cannot be because a plea is interposed by counsel in a case where learned gentlemen, who are not adepts upon the subject of insanity, can so easily and at a glance detect its nonexistence.

But, gentlemen, I will not deny that this cause is important, and as such we have treated it, and as such we shall continue to treat it, despite of lamentations here or elsewhere; despite of ridicule of counsel, the contumely of some, and the threats and denunciations of others of our fellow citizens. It is important. The public has suffered themselves to become excited upon this subject; there is a demon thirst for blood, an unchristian thirst for revenge; and it is important to ascertain whether, under all these disadvantages, we can obtain for this once a man, this now but a clod, a fair and impartial trial, by and before a jury of our country. It is this, and this only, that renders this cause important.

The learned District Attorney has suffered himself to declaim to you upon the consequences of an acquittal. He has told you that the effect of an acquittal by you, would be to discharge the accused; to release him from imprisonment; to turn him loose upon society to kill and slay your fellow citizens. What! a *sane* man, and so dangerous? But, gentlemen, in this the learned gentleman has suffered his imagination to outrun the law and the facts of the case. Does he forget, that although acquitted upon the charge for which he is now upon trial, yet there would remain some three or four other indictments for murder against him? For I need not say to you, at this stage of the trial, that he is now upon trial for the murder of John G. Van Nest, only. How, then, is he to escape from confinement, were he to be acquitted by you? I tell you, gentlemen, it cannot be. Whether convicted or acquitted, he cannot, and, I will add, he should not, be allowed to escape from the restraint of the law. I concede, nay, I aver, that he is, and he long has been, wholly unfit to roam at large. He would be, as he has

been, a dangerous person, if at large. And he would be so for the sole reason that his judgment and reason have been, and are, dethroned; because he now is, and long has been, suffering from a diseased brain, and is and has been in a state of insanity. But I do not say this to influence you in regard to the verdict which you shall render; that must depend upon the evidence as it shall operate upon your understandings. If you shall be convinced that he is guilty of the death of John G. Van Nest, of which he stands charged, and that he was at the time sane, then, gentlemen, I trust you will so say, unhesitatingly, whatever may be the consequences. And, on the other hand, should you be convinced that at the time of the death of that lamented fellow citizen, the accused was insane, then, gentlemen, I trust, and will not doubt, that you will most cheerfully so say by your verdict, let the consequences of that verdict be what they may.

The District Attorney has also suffered himself to speak of the frequency of the interposition of the plea of insanity, of the difficulty of bringing offenders to justice. Gentlemen, I will ask the learned District Attorney, I will ask you, if the case was ever heard of, where such plea was interposed successfully, unless true in fact. He has also, by way of ridicule I suppose, suffered himself to speak of somnambulism in connection with this subject, and would fain carry the impression, at least, that the one was as easily feigned as the other. But such declamation is nothing new; it has been used before, and doubtless will be so used again. In speaking of the trial of Louis Lecouffe, who was tried at Paris in 1823, Doct. Ray, in his Medical Jurisprudence, (Sec. 84.) says, "Against all this array of evidence, the advocate general had nothing to offer but the idle declamation usually resorted to on such occasions. The attempt of the prisoner's counsel to establish the existence of imbecility and mania, he reprobated in the severest terms, as dangerous to society, subversive of social order, destructive of morality and religion, and affording a direct encouragement to crime."

Had the learned author attended this trial, he could not more truly have described the efforts of our learned and distinguished adversaries.

But, gentlemen, had no one testified upon the subject, methinks any one upon reflection might be tempted to doubt the sanity of the accused. Why did he commit these five-fold murders? What was the motive? He had no ill will against any of them; they had never offended him; his object was not plunder; he took nothing; he did not attempt to take anything. No motive whatever, not only no adequate motive, if such term can be applied in any such case, but no motive whatever has been, or, as I think, can be assigned for the deed; and shall we, can we for a moment believe that a *sane* man can thus kill and slay his fellow man? I cannot so believe. But I do not therefore say that *you*, sitting as jurors, to try the prisoner upon the evidence, can safely come to this conclusion; *you* must have affirmative evidence upon the question of

this man's insanity. And this brings me to the question, "What is insanity as now understood, and as that term is used in the Revised Statutes?" Doct. Ray, in his work before cited, tells us that "it should be distinctly understood that it is, first, a disease of the brain; and secondly, that in its various grades and forms, it observes the same laws as diseases of other organs." He further tells us that "Mania arises from a morbid affection of the brain."

It is no mysterious matter, no special visitation, but that to which all flesh *may be* heir to; something that must be proven by the testimony of witnesses, and be judged of as any other matter of fact.

It is not necessary, to constitute a man insane—nor indeed is it usual—that he shall lose any of his faculties, but that some one or more of them shall become deranged, disordered, not lost or destroyed; and so says Mr. Guy, in his work upon this subject. He says, "The insane differ from the sane, not in having lost any of their faculties, but in exercising them differently."

But, says the District Attorney, this man's faculties are *all* sound. That, gentlemen, is the question between us; the question that you, and not he, must decide. He says this man had premeditation; he prepared his weapons before hand, and then concealed them until he wanted them for use. And what does that prove, gentlemen, upon this subject? Guy tells us, that "the maniac, if naturally of a reserved disposition, or when impelled by a strong motive, has the power to conceal his delusion." He further says, "The acts of the madman often evince the same forethought as the sane. He is often conscious of his state, and knows the legal relations in which it places him." I believe, gentlemen, that is more than is pretended here, in regard to the accused. I think we have not as yet heard from any witness, that Freeman has ever said, or done, or admitted anything, whereby it could even be suspected that he understood, or that he now understands, the legal relation in which the act committed by him has placed him.

But, say the learned gentlemen who appear for the prosecution, he has memory, and very retentive too. We do not deny that he has memory, and retentive, too, in regard to some things. But was there ever an insane person who had not? Nothing short of utter and total imbecility can destroy that organ; it may be very much diseased, and, in regard to some things, or perhaps it would be more correct to say, in regard to some class or classes of things, it may be entirely gone, when as to other things or classes of things, it may be unimpaired. We have many instances of the kind in the books. Hear what Ray says, upon this subject: "Generally speaking," he says, "after the acute stages have passed off, a maniac has no difficulty in remembering his friends and acquaintances, the places he has been accustomed to frequent, names, dates and events, and the occurrences of his life." And has Freeman shown more than this? Ray further says, "The ordinary relations of things are, with some exceptions, as easily and clearly perceived

as ever, and his discrimination of character seems to be marked by his usual shrewdness. His replies to questions, though they may sometimes indicate delusion or extravagant notions, generally have some relation to the subject, and show that it has occupied his attention." And now, gentlemen, apply that doctrine to this case. All the information we have from Freeman, has been procured by interrogating him; and you will remark, that his answers are uniformly very short. He never converses, not even for a single sentence. It is true he generally answers questions that are asked, if within his comprehension, which is conceded to be quite limited, but his answers are uniformly of the shortest, and most generally in monosyllables; and do not his answers, when asked why he killed these people, most clearly indicate his delusion?—"wanted my pay." And was that the "pay" a sane man would want, and from one who never owed him—with whom he had never dealt? Was there not delusion here? But I must leave this for another, in whose hands it will meet much better justice.

But, says the learned counsel for the prosecution, when we ask what is insanity, "The law has settled that." Indeed! and how has it been settled? "Why," says the District Attorney, "any person who knows enough to distinguish right from wrong is sane." But there are many cases, and all of the late cases upon the subject decided in this state, and also in Massachusetts, which show that such is not the law. A person must at least have sufficient reason, mind and memory to distinguish right from wrong in relation to the particular act charged against him. Hear what Doct. Ray says upon this subject. "That the insane mind is not entirely deprived of this power of moral discernment, but on many subjects is perfectly rational, and displays the exercise of a sound mind, is one of those facts now so well established, that to question it, would only betray the height of ignorance and presumption. The first result, therefore, to which the doctrine leads, is, that no man can ever successfully plead insanity in defence of crime, because it can be said of no one, who would have occasion for such a defence, that he was unable in any case to distinguish right from wrong." Thus, gentlemen, you will perceive, the doctrine contended for by the prosecution, and which, by the by, was the doctrine which caused and which received the verdict of the former jury in this case, stands plainly, and palpably, and flatly contradicted by the authorities of our courts, as also by the authority of the medical writers on this subject.

Much has been said, gentlemen, in regard to this defense. It has been characterized as a dangerous doctrine, liable to great abuse; and much, indeed, has been said upon the subject that can have but little reference to the case before you; for, as I have already shown you, gentlemen, there can be no danger in this case to society, or to individuals, should the defense prove, as we think it should, and as we hope it may, successful. But the justice of such a defense, when true, in fact, has been ably, eloquently and truly stated,

by the author from whose work I have already so liberally quoted. [Secs. 66, 67, 68, Ray's Med. Jour.]

The learned counsel for the prosecution insist, that upon us lies the onus, as the lawyers call it, of this issue—that is, we must prove the insanity; that inasmuch as men are generally sane, and we claim the exception, we must show, affirmatively, that such is the case. Well, gentlemen, however hard, and, allow me to add, somewhat absurd, it may appear, to require a crazy man to prove his insanity, yet I suppose such is indeed the law of the land, and we must conform to it. Then, gentlemen, how shall we prove this issue? What kind of evidence shall we present to you, to convince your minds that this man was insane at the time the offence is alleged to have been committed? We shall first show you the accused as he was in his infancy, and in his boyhood; that he was an active, bright, sprightly lad, in no wise addicted to quarreling or other evil practices. In fact, if our information be correct, we shall show you that he was, when young, good natured and kind in his disposition, and that he so remained until after his incarceration in the penitentiary for a crime which he then and now insists he never committed. That while confined in the prison, he was abused, ill treated and flogged; that he became morose, soured in temper, and desperate, and was so altered upon returning to the world, that his friends scarcely knew him; even his mother could scarcely believe it possible that this morose, surly and sour young man could be her bright and cheerful boy, from whom she parted but a few years before. This change alone, gentlemen, you will find, from the medical books which we shall produce before you, and from the testimony of the medical gentlemen whom we shall examine upon this subject, to be one of the most unfailing symptoms of insanity; so much so as to be considered a test in all such cases.

[*The Counsel* then spoke of the ignorance of the accused; of his want of opportunities for improvement; of his isolated position, by reason of the wicked and unchristian prejudice against him and all others of his kind, by reason of their color; of the wrongs he had suffered, the hardships he had endured, and the cruelties which had been inflicted upon him; and was amazed that people should now hold up their hands in holy horror at the result of their own treatment of this "unlearned, ignorant, stupid and degraded negro."]

Gentlemen, the epithets used by the learned District Attorney, are all applicable, and yet there are men, even in our profession, who dare believe that "God made of one blood all the nations of the earth;" and that notwithstanding all his ignorance, and stupidity, and degradation, he has been a brother man, made in the image of his Maker, and might have so continued but for the brutal treatment received by him amongst this Christian community. That notwithstanding all this, he is yet entitled, and so far as the efforts of his counsel can secure it, he shall have a hearing as candid

and as patient, a trial as fair and impartial, as could be accorded to him were he the son of an ex-president.

But, gentlemen, there is another species of testimony, which is allowed by the laws of the land, and of which we intend to avail ourselves in this case. I allude to the testimony of medical witnesses; of those who have been accustomed to the society and treatment of the insane. And we hope you will cast aside all prejudice, if any you now have, against these gentlemen, or the evidence which they have already given, or shall hereafter give.

You have been cautioned by the learned counsel opposed, against the evidence of these witnesses. You have been told that there is great difference between "testimony" and "evidence;" that "testimony is but the declaration of witnesses, and becomes evidence only when it carries conviction." That may be a very comfortable doctrine for a juror who is desirous of rendering a certain kind of verdict; for if this view be correct, I will guarantee conviction will not follow, unless the declaration of the witnesses shall correspond with the wishes of the juror. I trust, gentlemen, nay, I will not doubt, that you will at once reject a doctrine so absurd and so dangerous. Again, the learned counsel who here represents the county, has warned you most earnestly, and with much solemnity, against placing reliance upon the opinion of witnesses. And in this connection he most unnecessarily, and, as we think, rather rudely, arraigned before you the most estimable and worthy, and not more estimable and worthy than learned, principal of our Lunatic Asylum, and also against the president of the State Medical Society. Gentlemen, I know not your feelings or views upon this subject, but to me there appeared something so grating to the feelings, and so repugnant to the good taste, and so foreign to the courtesy that should in all cases govern counsel when speaking of those who are, by the process of the court, and at a great personal sacrifice, compelled to attend as witnesses upon this trial, in behalf of one who can in no event, nor by any possibility, remunerate them, even with the small pittance of his thanks, that I know it will be unnecessary to do more than merely allude to the circumstance, to cause even the learned counsel to regret that in the hurry and excitement of his opening speech, he should have sneeringly compared the opinions of these and other eminent gentlemen, whose testimony has already been heard in this defense, to the belief in necromancy, divination, &c.

The learned gentleman told you to start with no mysterious notions in regard to this matter of insanity; that it was not men of letters, those who were crammed with theories, who should give the law in such cases. Why, gentlemen, what would the learned counsel have in this case? Our poor senseless client is so ignorant, it would almost appear, from the learned counsel's estimate of him, impossible that he ever could have changed for the worse, and without some such change argues the counsel, he cannot be insane. On the other hand, our witnesses are so learned, or so crammed

with theories, (to use the language of the learned gentleman,) that they are unsafe judges in relation to the question of his sanity. No matter that they have devoted the energies of a well disciplined and cultivated mind to the diseases of this of all other the most peculiar and sensitive of the human organs; no matter that they have for many years devoted their time and attention, their sleepless nights and their watchful days, to the care and attention of these, the most unfortunate of the human race; no matter that with philanthropy unbounded, they have devoted themselves solely to the study and alleviation of "the mind diseased." No matter for all that—yet because their learning, their experience, and may I not add, gentlemen, their wisdom, does not happen to coincide with the opinion of the learned counsel, in regard to the condition of the mind of this particular subject—this "unlearned, ignorant, stupid and degraded negro"—they must be the subjects of his ridicule, and that science, the most difficult in the range of human studies, is compared with the exploded errors of a barbarous age. But, gentlemen, I was glad to hear the learned counsel, in the warmth of his address to you, refer to the scene between Festus and the great Apostle to the Gentiles. Nothing more apposite to the present occasion, could have been selected from that inspired volume than this most memorable scene. "Festus said with a *loud voice*, (I wonder gentlemen, if he had ever been District Attorney,) Paul, thou art beside thyself, much learning doth make thee mad;" and so says the learned District Attorney, to the mildest and gentlest of spirits, whose learning is doubtless as much beyond the comprehension of the learned counsel, in this case, as was that of Paul's beyond the comprehension of the most noble Festus, in regard to the matters about which Paul was then pleading. And well might Doctor Brigham answer his accuser in the same language as was used by the great Apostle on that occasion, and with strict truth: "I am not mad, most noble Festus, (most learned District Attorney,) but speak forth the words of truth and soberness." But, gentlemen, I must bring this part of the subject to a close. It is, you are aware, the sheet anchor of our hopes in this case, and I must therefore be pardoned for the time I have spent upon it.

And now, gentlemen, in conclusion, I must beg, nay entreat of you, in the name of that justice which you are called upon to administer, to cast aside any prejudice which you may have imbibed against the prisoner, his counsel or his defense; to give to his witnesses a fair and impartial examination; to his defense a fair and impartial scrutiny, and to his counsel a fair and impartial hearing. And as you hope to have meted out to you, so do you mete out to this wretched imbecile the same measure of justice.

THE WITNESSES FOR THE PRISONER.

Warren T. Worden: Am a counsellor at law; have visited the jail to satisfy myself. His answers were in monosyllables, yes, or no, and not very plainly spoken. Asked if he went in at the front door; he answered yes; and if at the back door; he gave the same answer. Asked whether his hand was hurt in the hall; his answer was, yes. Then asked if it was out at the gate; he said, yes. I asked whether he stabbed Mrs. Wyckoff in the hall; he answered, yes; whether it was out at the gate; he said, yes. Pressed to tell what Van Ness said to him, he replied, "If you eat my liver I'll eat yours." Asked whether he went out of the front door, he answered, yes; and he gave the same answer when I asked him if he went out of the back door. Asked him why he left there before he had killed them all; he said, "My hand was hurt, I couldn't kill any more." Asked why he killed them; he answered, "What they sent him to the State Prison for when he wasn't guilty." He trembled and acted as if he was about to cry. I told him he would be hung for killing those people; he didn't show any feeling. He laughed frequently — laughed when we went into the cell and laughed when we laughed; it was not loud, an unmeaning, unnatural smile.

Do not believe him sane. Don't believe he understands what is going on around him. He does not appear to be capable of distinguishing right from

wrong; in my judgment, he would laugh upon the gallows as readily and freely as he did in his cell. He would probably know as much as a dumb beast that was taken to the slaughter house, as to what was to be done with him. If that state of mind and knowledge constitutes insanity, then he is insane.

Do not believe his appearance was a feigned one, nor that he pretended insanity to deceive me.

Cross-examined: The jury had the benefit of my testimony on the trial, yet they found him capable of distinguishing right from wrong, but my opinion was and now is variant from their verdict.

Joseph L. Richardson: In September, 1840, was first Judge of this county, presided when William Freeman was convicted of stealing a horse. He was convicted and sentenced to State Prison for five years.

Dr. Blanchard Fosgate: Am a physician in Auburn. On sixteenth of March last was called to visit prisoner in jail and to dress his arm. It had been severely wounded in the wrist with some sharp instrument. The artery itself was not wounded. Later I inquired if his hand was better; remember no reply, but he never complained. He never asked whether it was better, whether it would get well or whether he ever would recover the use of his hand; nor did he speak to me unless spoken to. Dr. Hurd asked what he killed those folks

for, whether he went for money. He replied, "They put me in State Prison."

Look upon him as a person who is sinking into idiocy. He does not comprehend the idea of right and wrong—has no moral sense of accountability. As to his capacity to distinguish between the consequences of killing a man or a beast, think it was immaterial to him; and that he was incapable of distinguishing between the moral consequences of the two acts. Think him incapable of comprehending his situation and accountability. My reasons are, his insensibility to pain, his never inquiring relative to the prospect of his hand recovering, seeing he had to live by work; his irresistible propensity to laugh; his indifference to remorse or fear; and to sympathy. Telling him one day, if he wanted anything, and would let me know, I would get it for him; or if he was sick, and would tell the jailor to send for me, I would come up; I spoke as kindly as I should to one of my own children; he made no manifestation of gratitude nor did he say anything in reply.

Cross-examined: Did not infer he was a brute; take him to be a human being with some intellect, deranged; consider idiocy a species of insanity. Know Dr. Brigham. When my own knowledge does not contradict his opinion, think his authority as to sanity is of the very highest order.

If the law should say that idiocy was not insanity then I should think that the law could

not impose any rules or regulations upon the human constitution as it is given by the Almighty, and would not make any difference with the fact. A sane person suffering pain as he must have done would not have endured it without complaint. If it should be proved that he complained of pain and requested a doctor it would not change my mind. He would know a man from a beast, by the external form, and by name. So far as any moral principle is concerned, don't think he knows the difference between a man and a beast. The statement that he knows that they hang people for killing men, and not for killing a beast, would not change my mind. Do not suppose he thinks they hang people for killing beasts. He said No, when asked if he was crazy. Think he does not care for anything he has done. He was only sorry that the child wasn't bigger. He does not care for killing this family; and that circumstance goes with the others to make me think he is insane. If a dog were wounded, and in a sound state of mind, I think he would manifest sensibility to pain.

Martha Godfrey: I reside in Sennett; have seen the prisoner. He came to my house last March and before the murder of the Van Nest family; wanted to know if this was the place where a woman had a horse stolen five years ago. Told him it was. He said he had been to prison for stealing it; but that he did not steal it. Told him that was something I did

not know anything about; that he had been tried and found guilty of it, and sent to prison. Joseph Johnson asked him whether he wanted the horse or what he did want. He said he did not know. I gave him some cake. He sat awhile, smiled and said he didn't want the horse now. Said he had been to prison for stealing the horse, but didn't steal it, and wanted a settlement.

I had a horse stolen five years ago and was a witness against Freeman on the trial. John G. Van Nest nor any of his family, nor any of the persons in his house were concerned in the trial in any way, or related to me.

Cross-examined: The next morning after the murder we saw horse tracks where some one had been. There was snow on the ground in my yard where the tracks were. The afternoon prisoner came to my house was during the trial of Henry Wyatt for murder. Did not think of his being crazy then.

John DePuy: My wife, Caroline, is a sister of prisoner. Prisoner has lived with us; don't recollect how long. He was then an active, smart boy—lively as any other you could find—a good boy to work. Set him to work anywhere and he would do it. Sociable and understood himself and had some learning. Could read in the spelling book pretty well. Whilst he was in prison for stealing I saw him five different times. Didn't speak to him. He was carrying something on his back like a knapsack and walk-

ing back and forth in the yard. Didn't appear as he did before he went to prison—appeared stupid—don't think he knew me; took no notice of me. Saw him after when he was at work and when he wasn't doing anything. There was something the matter with him—don't think he was in his right mind. The day he came out I went over there to fetch him home. I waited in the hall; he passed me as if he didn't know me. I went up, touched him and asked him if he knew me, and he kind o' laughed. He came along to Applegate's where I was at work help raise a building. He sat there and acted very stupid and dull and said nothing. They asked me, "what damned fool was that who was sitting there." He didn't know the value of his money. He thought his half dollars were quarters. He went to a hatter's shop to get a cap. They asked four shillings; Bill threw down two halves for it. I handed back one of them to him and told him to go with me. After he came out he told me that he hadn't paid for his cap, that they would make some fuss. After he got home I talked with him and how they had used him in prison. Said they had knocked him around and that he thought he wouldn't stand it. Said he struck Hoskins with his left hand and faced him around and then he came the butcher's chop on him; that he dropped his left hand over his face and struck him with the right. That's what he called the butcher's chop. He said Tyler used to

strike him and kick him generally when he passed him. Tyler took a piece of board and struck him across the ears. It knocked the hearing off so that it never came back again. Asked him if they did anything for his deafness; said they put salt in his ear, but that it didn't do any good, for his hearing was gone—was all knocked off. They threatened to put him back there again when his time was out. Said he broke a knife in the prison for which they made that threat. Bill then asked me if they could put him back there for that.

Know Jack Furman. They said Jack stole the horse but prisoner was taken up for it. Bill frequently inquired for Jack after he came out of prison. Jack is now in the State Prison. Told him he was in there, a convict. Said he had not seen him; that they sent him for nothing when he wasn't guilty. He wanted a warrant, for he must have his pay. I told him who the magistrates were. He came back and said he couldn't get one—couldn't get nothing. He said they would cheat him all the time and he couldn't live so. Later he said he had been sawing wood for Mr. Conklin for which he was to give him three shillings, but wouldn't give him but two; that he throwed the two at him and came to see whether he should whip him or what. Told him not to do it, that they'd put him in jail. Said there wasn't any law for him, they wouldn't let him have a warrant and they cheated him

all the time. He said there was another man that wouldn't pay him—Murfey. I went to see Murfey; he said he had paid him all he agreed to. His mind last winter was very unsteady, half of the time he didn't know what he had done—didn't seem to know where he'd been. Never said anything unless spoken to. He'd sometimes kind o' smile. He talked to himself and tried to sing. He would get up three times in the night. One night he said, "By G—— I'll see you out." He would try to read but he couldn't read right. I would ask what he got up for, he would say, "didn't know." He acted so very strange that we talked about it at the house.

Know Sidney Freeman, the prisoner's uncle and his aunt Jane Brown. They were both crazy and Sidney is crazy now. He had not been drinking then. Heard they had been giving him liquor, but I never saw him drink. Told them at Gale's grocery not to let him have it. When he was arrested I said he ought to be arrested. Was told that he threatened my life, but Bill never made threats to me. Knew John G. Van Nest and so did the prisoner. Knew of no difficulty between him and the prisoner.

Cross-examined: Don't recollect of saying that he was a good enough boy if he would let liquor alone. Have said I was glad he was arrested because any man ought who had done such a thing as he had. Have not said that he pretended to be crazy but was sane; have said he was a great deal

better when he let liquor alone. Didn't say he was perfectly sane when he let liquor alone. Might have said I was afraid to have him at my house and drove him away. Was at a dance with prisoner the night before the murder. Did not say to Asa Spencer that he was no more crazy than me. Don't remember saying to Thomas Munroe that he never was crazy, but was damned ugly. Freeman told him he was going to kill Van Nest and me too. Had heard that he was struck by Tyler in the prison and knocked so he wouldn't live and I asked him to tell about that affair; he took about half an hour.

John R. Hopkins: After the murders, went to his cell and conversed with him. Asked him if he was in Mr. Hotchkiss' class and pointed to Mr. H. at the time. He said, "I don't know." Asked him what he learned at Sabbath school; he said, "The good." Asked if he learned about God; he said, yes; if he learned about Jesus Christ; he said, yes. If he learned about heaven; he said, yes. Asked him whether he knew who God is, but could get no satisfactory answer. Asked him if he knew anything about Jesus Christ; he said he came to the Sunday school once. Asked what he did; he answered, "Don't know." Asked if he got his pay for the time he was in prison. That roused him up and his whole countenance brightened; he said, no. Asked who ought to pay him. He said, "All of 'em." I asked if this man, Hotchkiss, ought to

pay him. He looked at him as at me and said, "Do what's right" or "Well, do what's right." We then spoke to him about his trial. He became stupid and dull again. Was satisfied he knew nothing about the trial. Took his hand and asked who cut it. He said, "A woman." Saw a testament there; asked him if he could read; he said, yes. Gave him the book and asked him to read. He mumbled over incoherent sounds. I recognized the words, "God," "Father," "Jesus Christ," "Mercy." I watched him sharply to discover any simulation, but I couldn't; there was no deception. If there had been I should have detected it. As to his mind and intellect, I think him a little above the brute. He is insane on the subject of pay. That idea is the controlling influence of his mind; on no other subject is he awakened at all.

Cross-examined: I supposed the extent of his knowledge was the measure of his accountability, legally as well as morally. If he wanted all knowledge I should consider him wholly irresponsible.

Rev. John M. Austin: Am clergyman of the Universalist church in this village. After the murder, visited him several times at the jail; found him of very feeble intellect and quite stupid. The object of my first inquiry was to find whether there was any connection between that murder and the Wyatt trial. Inquired whether he knew Harry Wyatt in the State Prison; he answered, no. Asked if he knew that Wyatt

killed a man there. He answered that he knew or heard that a man was killed. Asked if he knew who killed him, he said, no. If he was in the Court-house during his trial? He answered, no. If he knew that Wyatt had a trial? He answered, no. If he knew what defence was set up on that trial? He answered, no. If he knew the result of that trial? He said, no. If the result of that trial had any influence on his mind in committing this murder. Answer was, no. If he probably would have killed these people if Wyatt had had no trial or if the result had been different? He answered, yes.

Put questions to find his motives in killing that family. His answers were broken and incoherent, but they invariably had reference to his being in prison innocently. Asked if the persons he killed had any thing to do with putting him in prison. He answered, no. Asked why he killed that particular family. I got no direct answer, except something about being put in prison wrongfully. Asked if he thought it right to kill people who had no hand in putting him into prison. His answer was in effect, "Shall do something to get my pay." Asked how much pay; his answer was, "don't know." Asked why he entered that particular house. He said, "I went along out, and thought I might begin there." Asked what question Van Nest put to him when he went in. He said, "he asked me what I wanted." Asked what he said in reply. He said,

"I came in to warm my hands." Asked if Van Nest said more to him before he stabbed him. He said, "he said, if you eat my liver I'll eat yours."

Asked whether he had ever been at church. He said, "yes, some." If he had ever been at a Sabbath school. He said, yes. "To First church." Asked how he became deaf. His words were something like this: "It felt as though stones dropp'd down my ears;" or this, "as though the stones of my ears dropp'd down." Could not get the whole of it—it was so incoherent.

The conversation was chiefly on religious subjects. Tried to convince him that his acts were wicked, and I asked him if he did not think he ought to ask forgiveness of the Saviour for the act; but I could get from him no answer that indicated that he comprehended me. I abandoned the attempt to impress him with the nature of his guilt. Asked if he ever prayed. He said, "yes, when I was a boy." Asked if he had ever prayed since he came out of prison. He said, no. If he had prayed since he committed this act. He said, no. Asked him to promise me that he would. He answered, "I will." If he would like to have me pray with him. He said, yes; I did pray with him in his cell. I inquired if he would like to have a testament. He said, yes; and said that he could read. He sometimes smiled when there was no occasion for it. The same I have seen upon his countenance here in court, and which others have noticed. As

to his reading I found that he was unable to do so. I was astonished, as he had told me that he had read in the testament, which I had presented to him. When directed to read, he opened the book, fixed his eyes intently, bent his head over and pointed with his finger, as would a child three or four years old. At one time he opened to a chapter commencing with, "In those days came John the Baptist." He pointed with his finger, and said, "Christ, or God, Moses, good, come, man."

He would spread his fingers apart and count, in a peculiar tone of voice, up to twenty-five; once he got to twenty-seven, and then said, "twenty-eight," and then, "eighty," and then wandered about. There was on his part an eagerness to read and count. Put questions to find his motive for killing. Asked if the persons killed had any thing to with putting him in prison. He answered, no. Asked if he knew their names. He said, no. Asked why he killed that particular family. He gave no answer, except something about being put in prison wrongfully. Asked if he thought it right to kill people who had no hand in putting him in prison. His reply was something like this, "shall do something to get my pay." Asked how much pay he thought he ought to have. His answer was, "don't know." Asked if it was right to kill those innocent persons for what had been done by others. He said, "they put me in prison." Asked who did—the Van Nest family? He

answered, no. Asked whether he thought it right to kill that innocent child. Understood from his gestures in reply, that he was in a labyrinth from which he was incapable of extricating himself. Asked if he ever called on Mrs. Godfrey; he said, "I went to Mrs. Godfrey to get pay and she wouldn't pay me. I went to the Squire's and they wouldn't do nothing about it." Asked why he intended to kill the keeper; he said, "I was called up to be flogged because I wouldn't work." Asked why he wouldn't work, "Because I went to prison innocent and thought I oughtn't to work" He said in reply to some questions, "If they'll let me go this time I'll try to do better," which showed an entire want of rational appreciation of the nature and enormity of his deeds and an entire ignorance of the consequences of his act. Do not believe any man of his age, possessing a sound mind, could suppose that he could be allowed to escape all punishment simply by promising to do better.

He did not dissemble. Should suppose him the shrewdest man in the world if he did dissemble. Have not the slightest doubt that there was no attempt to dissemble. He was very deaf. He did not dissemble deafness. Previous to this trial, I called on Governor Seward, and conversed with him about this prisoner and his deplorable condition. Requested Mr. Curtis and Doctor Robinson to go with me and see the prisoner. Have felt some solicitude on account of this

man; but have not done any thing but what I conceived to be my duty. Inquired of the prisoner whether he had counsel. He didn't comprehend the question at first. He finally said, no. Asked if he would like to have Gov. Seward defend him. At length he answered, yes. Before the conclusion of my last interview, became satisfied that his mind was in a singular condition; and the result of all my interviews has led me to believe his mind is in a shattered or unsound state. Can give no technical name to the difficulty. Believe he knows right from wrong in regard to common transactions with which he has been familiar; the same as a little child of five or six years old does. But on topics involving the right or wrong of seeking redress for injuries received, on the principle of retaliation, consider him incapable of discriminating between right and wrong. He could not assign any consistent motive for his indiscriminate slaughter of men, women and children. There was no motive that would actuate a sound mind.

Cross-examined: Have not been very active in this case, not so much so, perhaps, as I should have been. Have taken a deep interest in it. This murder is a legitimate consequence of the neglect of the colored people in this place. Have written about this case and published letters in religious papers; they contain matter in opposition to capital punishment; think it very wrong

and that it is a relic of barbarism. Cannot think it right to take the life of another, and hence I am opposed to hanging any one. I said this community were to a certain extent responsible for the crimes committed in their midst, and I think they are. Have talked about it a hundred times. Should not consider lying any evidence going to prove sanity or insanity; but I have no idea that he did lie. His evident candor and frankness convinced me that he was not lying. Freeman had no adequate motive; that is one of my reasons for thinking him insane. That an innocent man should kill I should consider a strong mark of insanity. I am quite confident that a sane man twenty-three years old who cannot read, but thinks he can—who cannot count more than twenty-seven or eight, but thinks he can, cannot be found in this county. Insane people commit crimes; they often deny the offence afterwards.

Lyman Paine: Am a magistrate. On the Saturday before the murder prisoner called at my office and said he wanted a warrant. I asked what for. He came nearer and said, "Sir, I want a warrant. I'm very deaf and can't hear very well." I then asked in a loud voice what he wanted a warrant for. He replied, for a man who put him in State Prison. Asked his name and he told me. I said if he had been to the State Prison, he had been tried for some offence. He said he had, for stealing a horse, but he didn't steal it. Asked who

he wanted the warrant for. He told me Doty. I then said, "Then you want a warrant for perjury—for swearing false." That in order to get a warrant he must get at the facts. He then appeared to be in a passion; said he had been abused, and would have satisfaction. I told him I would not give him a warrant without further information. He stood a while longer and then threw down two shillings, and said, "I demand a warrant," and was in a passion. Said I should not take it, nor give him a warrant without further information. That he had better go away and find a place and go to work, or he would get into prison again. He said, "I'm so deaf I can't get work; people won't employ me. I've been trying, and can't get work." He then took his cap and left, and as he went out he shut the door very hard. Inferred that he was very deaf, ignorant and malignant. In the afternoon he called again and he named Mr. Doty and Mrs. Godfrey. I refused him a warrant.

Cross-examined: He said he did not steal the horse he was tried for. At that time I came to no conclusion that he was crazy.

David Winner: Knew Jane Brown. She has a sister who is crazy. Sidney Freeman, the uncle of prisoner, has been crazy a good many years. William's mother is called an Indian woman, but she is part French and African. When this boy was twelve or thirteen he was a pretty, sprightly lad, sensible, and very lively. Saw no differ-

ence between him and any other boy of sense. Saw him about a week after he came out of prison at his uncle Luke's. He then appeared to be a foolish man. I hardly knew him. I asked Luke if that was Sally's son. He told me he was. I said he was very much altered. Luke said he had just come out of prison. He was sitting down in a chair, snivelling, snickering and laughing, and having a kind of simple look. Spoke to him, but he didn't speak to me. Was told to speak louder for he couldn't understand. Saw him during Wyatt's trial, at Laura Willard's. Stayed there three nights, and slept with William in the same bed. At night he got up and talked to himself. Couldn't understand what he said. He appeared to be foolish. Gave him a dollar to get a quarter of a pound of tea and two pounds of sugar at a store, and a beef steak at the market. He went to the market and got it all in beef steak. When I asked what he did that for, he said nothing, but laughed at me. He got up nights two or three times, and I felt cold, and told Laura I wouldn't sleep with him any more. He sung when he got up nights, but there was no meaning in what he sung. He was sober as I was. There was no liquor there for him to drink.

Ira Curtis: Am a merchant. He worked for me in the spring of 1840 in the kitchen yard. His disposition was not good; was stubborn and stupid. He was of no use to me. If I sent him away five rods he would be just as likely to bring me

the wrong thing as the right one. He was a dull, morose, stubborn boy, and if he had any capacity, I could not discover it. Saw him in the prison—talked through the grates. Mr. Austin, our clergyman, came in and we went into the cell together. Asked him if he knew me; said he did and called me by name. Asked if he could read; commenced or pretended to commence and read but he didn't read what was there. He looked at the book and repeated, "O, Lord - Jesus-Christ-mercy-Moses" and other such words indiscriminately and mixed up. Some of the pretended words I did not understand and doubt whether they are to be found in any language. None of the words repeated were in the place. I took the book and told him that he didn't read right. He said, "Yes I do." I told him that he couldn't read. He said, "Yes, I can." I took a paper upon which was the word "admirable" and asked him what it was and he said "woman." The word Thompson and he said "Cook." Asked him to count; he commenced and counted up to twenty, hesitated and then went along to twenty-eight and then jumped to eighty. Asked how many two times four was; he said "eighty." Asked him how many two times three was, he said "Sixty" or "Sixty-four." Asked if he killed the child; he said, "They said I killed one, but, Mr. Curtis, I didn't, I certainly didn't." Asked what he killed them for; he said, "You know I had my work to do." I told him that was nonsense

and repeated the question loud and distinct. He answered, "Well, I don't know, can't tell." Asked if he had anything against those people or against Mr. Van Nest; he said, "No," and then to the same question he said, "I don't know." Said he didn't go into to kill them, thought it wasn't time yet; said, "They wouldn't pay me," that he had been imprisoned and "they must pay me." Asked whether that had anything to do with killing those folks, he said, "I don't know."

I asked if he thought he should be hung, he said, "Don't know." If he wanted to be hung; he said, "No." If he'd kill any more, if he was let go; he said, "No." Do not believe he knows any more of the moral character of an act than a cat or a dog. I do not think he has any capacity, or if any, it is as little as any human being can have. He don't feel any more compunction than a dog or a cat. A dog or a cat may know they have done wrong, but yet know nothing of the character of an act, nor feel compunction. Think he does not dissemble. I don't believe it is in the power of all in this room to teach him to carry on a piece of deception for fifteen minutes, because he would forget what he set about. He isn't capable of understanding. He is part fool—bordering on idiocy. I think he is idiotic and crazy.

Cross-examined: Some of the time I thought he was foolish—sometimes that he was crazy—and sometimes a little of both. Think now he is incapable

of understanding and of controlling himself—part fool, bordering on idiocy—crazy and an idiot; both crazy and insane. If all the doctors in the world should say he was not a fool, I should not believe them. For a moment I thought he knew better than to answer as he did; and then again I saw he didn't. When I told Mr. Austin that this was queer, he said to me, he thinks he can read but can't. Freeman was a stubborn boy when he lived with me. He was stupid—when I told him to do one thing, he'd do another. I think he knows less now than then. He was not deaf when he lived with me, and would understand what I said to him; he can't now.

It did occur to me once, whether the prisoner, with his appearance of sincerity, was attempting to play off a game of imposition. The thought vanished in a moment. There was too much before me. Have no doubt of his sincerity. Don't believe it is in the power of all in this room to teach him to carry on a piece of deception for fifteen minutes.

Charles A. Parsons: Am clerk in Gov. Seward's office. In last March, prisoner called and asked if it was a squire's office; he said he wanted a warrant. A man had sent him to prison, and he wanted to get damages. Told him where to go, but he did not understand me.

James E. Tyler: Was a keeper in the State Prison in 1841, and had Freeman under my charge. Soon discovered that he didn't work as he ought to.

Talked to him and found it did no good. Told him I was going to punish him for not doing more work, and should do so repeatedly until he should do more work. He gave as an excuse that he was there wrongfully and ought not to work. Told him I had done talking to him; that I was going to punish him. Received a blow on the back part of my head from him. As I looked around he gave me another blow upon the back. I then hit him with my foot and knocked him partly over. He jumped up, went across the shop and got a knife, with which he came at me. I then had to defend myself. I picked up a board and struck him on the forehead. Other convicts came up to him, but I told them to let him alone—that I would attend to him. I gave him eight or ten blows. I knocked the knife from his hand with the piece of board. I then flogged him ten or a dozen blows and sent him to his work. He never gave me any trouble after that, although he never did a full day's work. I considered him below the mediocrity of blacks.

Cross-examined: He was hard of hearing before the encounter and the blow. I was some excited at the time. A black man's hide is thicker than a white man's, and I meant to make him feel the punishment. Never punished him after that, though he never did a full day's work.

Ethen A. Warden: Am President of the village of Auburn; have known prisoner fourteen years—lived with me and be-

fore that with my father. We considered him a bright, active boy. He used to play truant. We considered him kind in his disposition. Supposed he went to Sunday school. Do not think there was any defect in his capacity. He was then about seven or eight. After he left my house do not recollect seeing him until in the State Prison. He appeared stupid and different from what I expected he would. He was deaf and did not appear as he formerly did, and it made an impression on my mind. He appeared bright when he lived with me. I thought to myself, "What's come over Bill?" He was more stupid. Asked if he knew me, he said, yes. Asked my name, he said, "Mr. Ethan A. Warden." Asked if he remembered living with me; he answered, "yes, I wish I was back there." Asked whether he knocked when he went up to Van Nest's door, he said, yes. Asked who opened the door? He said, "The man." Asked what he did; he said, "Went in, stood by stove." Asked what the man said; he answered, "What do you want?" Asked him what he told him. He said, "Warm me." Asked what the man said then; he said, "If I eat his liver, he'd eat mine. I made a pass at him." Asked what the man did next; he said, "Turned and fell out." Asked where he struck the woman; he said, "She came out, I made a pass at her." Asked if he knew there was a man upstairs; he said, "No, opened the door, saw a man, made a pass at him." Asked if the man knocked him

down; he said, "No, I tumbled and fell, broke my knife." Asked where he hit the old lady; he said, "At the gate, she chased me out." Asked if he had another knife; he said, yes. Asked where that was; he said, "By the gate, covered up, 'twas run under the snow." Asked what became of it; he said, "I've lost it, I broke it—horse fell down with me, broke my knife." Asked if his hand was cut there at the gate. He said, yes. Asked if the old lady cut it. He said, yes. Asked what made him kill the child. He said, "don't know any thing about that." At another time he answered, "I don't think about it; I didn't know 'twas a child." Once he said, "I thought feel it more." I said, "when you started from home, what did you go up there for?" He said, "I must go." "Why must you go?" "I must begin my work." "What made you do it?" "They brought me up so." Asked who brought him up so. He said, "the State." "They did not tell you to kill, did they?" "Don't know—won't pay me." "Did you know these folks before you went to prison?" No. "Was you there a few days before, to get work?" yes. "Did they say anything to offend you, or make you angry?" No. "What made you kill them." "I must begin my work." Asked if he did not expect to be killed. He said, "didn't know but I should." Asked what made him go, if he expected to be killed. He said, "I must go," or "I must do it." Asked if he went there to get money. He said,

no. Asked if he intended to get the horse. He said, no. Asked how he came to take him. He said, "broke my things—hand was cut—came into my mind—that the horse—go—and—get to—could do more work." Asked what he would have done if he had not broke his things. He said, "kept to work." Asked whether he would have killed me if he had met me. He said, "s'pose I should." Asked what made him begin at that house. He said, "stopped two or three places; thought it wasn't far out enough to begin." Asked if he was not sorry he had killed so many folks. He said, "don't think anything about that." Asked if he did not expect to be hung. He said, "don't think about it." Asked if he thought of what he had been doing in the night. He said, no. Asked what made him deaf. He said "Got stones in my ears—got it out." Asked if he got it out, and if he did not hear better when he got it out. He said, "Yes, I think I did." Asked if he drank anything when he started. He said, no. Asked if he drank any thing that day. He said, yes. Who got the liquor. He said, "I did." Asked how much. He said a pint. Asked if he was intoxicated when he started. He said, no. Asked if he could read. He said, yes. He took the book, put his finger on the line, and said, "Holy—happy—Jesus Christ — come down," and similar words that were not on the page. I was satisfied he could not read but he thought he could. I think there was no dissembling. I look up-

on him now and as he was when he lived with me and he appears different. I could not get anything from him that showed sorrow for what he had done or feeling for the crime. I don't think him much above a brute. Am of opinion he is deranged.

Cross-examined: Have taken active part in this defence. Should like to give my reasons why. Saw the condition of the prisoner, the excitement in the community, and the deep prejudice against him. Have conversed with counsel several times about the case. The law should be changed—am opposed to capital punishment; think the law ought to be defeated. Our laws ought to be executed, yet I think the law in respect to taking life is wrong. The prisoner I suppose thought he spoke the truth to me. Think he thought he was sent to prison wrongfully. Prisoner was not an ugly boy when he lived with me. I discharged him because his fondness for play was so great that he ran away from the house too often. He was not slow going upon errands. He generally did what I told him to do cheerfully. He was kind, cheerful, pleasant and attentive, but he would run away.

Dr. Levi Hermance: Have practiced medicine. Am assistant keeper of the State Prison. Saw prisoner first of December, he was sawing wood for me. He told me he had been in prison for five years and that he wasn't guilty and that they wouldn't pay him. Discovered that he was very deaf and inquired the cause of his deafness. He stated that his

ears dropped. Thought his manners very strange and singular, and what he said about pay very strange and singular. He spoke in a gloomy, despondent state of mind. There appeared to be a sincerity in his manner. Saw him again on the side-walk and he spoke to me again on the same subject. Saw him in jail and talked with him there. He related, not as a narrative, but in answer to questions. Asked how he happened to go up; he said, "It rained and I thought 'twould be a good time." Asked why he did not go up to some other family. He made no answer. Dr. Pitney asked why he did not kill him. He didn't seem to answer but smiled. Asked whether if he had found some other person he would have killed him. He said, yes. He said, "They'd sent me to prison and they won't pay me." Asked whether Van Nest had anything to do with sending him to prison; he said, no. If he didn't think he ought to be hung for killing that family; "Don't know, sent me to prison for nothing; ought I to be hung?" Doctor Pitney asked if it would be wrong for me to kill him (Dr. P.) The prisoner said, "Why, because he is the smartest man?" "No," said Dr. Pitney, "we are both alike." Dr. Pitney then said to him, "Would it be right for Dr. Herman to kill me?" The prisoner said, "That would be bad." My opinion of him last December was that he was a deranged man. Since then I have had no cause to change it—it is my opinion now.

Cross-examined: Have been

esteemed a Thompsonian practitioner. Was never a regular practitioner in the old line. Worked on a farm until I was seventeen; became an agent in a woolen factory; taught school winters; then practiced medicine some; have sold goods at auction; have been admitted as attorney in the court of common pleas; am now a turn-key in the prison. Was with Dr. Bigelow when he visited the prisoner and with Dr. Pitney. Dr. Pitney is the most profound; in surgery any medicine he is a far greater man than me.

Dr. Lansing Briggs: Have been physician and surgeon to the State Prison. Knew prisoner before he went to the State Prison; considered him a lad of ordinary intelligence. Have seen him in the jail. Whilst his hand was being dressed noticed his appearance closely and discovered that he manifested but very little sensibility as to pain. Noticed he smiled when we smiled. After Dr. Fosgate left, Mr. Worden interrogated him about the crime; observed the same smile and demeanor which I had observed before, but it seemed very difficult for him to tell his story without being questioned. Asked why he murdered the family; he repeated, "Why was I put in prison five years?" My opinion is and was that he had less mind than when I knew him before; that his mind had become impaired—that he had less vigor or strength of mind—was less capable of reasoning, comparing, retaining, and associating ideas. His mind is diseased—some por-

tions of it more than others; and although he is perfectly conscious of what he has done and was doing, he thinks and believes he has committed no crime. He justifies himself under the delusion that he had been wronged, and that society owed him reparation—that it was rightfully his, and was due to him as an equivalent and satisfaction. This delusion, in my judgment, is an insane delusion.

Cross-examined: The occurrence in the jail which induced the smile mentioned was the remarks made by a phrenologist upon Mr. Worden's head; caused Worden and myself to laugh. By his mind being impaired I meant that he was suffering with dementia and delusion. The symptoms of dementia are, loss of power of associating ideas—loss of memory—impairment of moral and intellectual powers—a weakening of perception and comparison—and a general loss of the powers of the mind. The physical symptoms which indicate such a state of mind, are a downcast look—aversion to exertion—indolence—loss of intelligence in the expression of the eye—and, in the extreme stages of it, drooling at the mouth. At the time of the murder, prisoner had the same symptoms as now.

Have no doubt that some criminals frequently give a false account; yet it would be perfectly natural that it should be so. Think that the taking of the horse was to repay himself for the debt due him. He honestly thought there was a debt due him and that he was en-

titled to pay.. He thought that he had been imprisoned wrongfully and that he had a right to recompense. This was his delusion. Dementia is a diminution, an impairment or decaying of the powers of the mind. Mania exists where the mental powers, or a portion of them, are excited into unnatural activity. It manifests itself by raving; but idiocy and dementia do not. Idiocy comes from *idiotia* and indicates a want of mind from birth. Dementia is a gradual impairment of the faculties. Have no doubt he knows the penalty of murder is hanging, but he thinks it should not be enforced in this case because he has done nothing but what is right.

Mary Ann Newark: Have known prisoner from a child up; he was a smart boy. Lived at my house, sawing wood and doing chores at the time of the murders. I washed for the students and he carried clothes for washing to and from the Seminary. He did chores for his board. He never said much—never asked me a single question, only talked when I asked him. When I asked him questions he answered quick and short-like. His manner was queer-like. He was very still. Never heard him talk about any person at all nor mention any body's name. During the day of the murder he put snow in the tub when I asked him. When the bells were rung for meeting the evening of the murders, he was at my house. Didn't see him have any knives. He was sober; didn't say where he was going; didn't see which way he went. He slept in my

house, up chamber. Don't know of his being up at night.

Cross-examined: He got his own victuals and cooked it himself. He slept at home every night. Before he went out on the evening of the murders he asked me if I had any chores to do. Told him to put some snow in the tub and he did so. Never saw any knives in his room.

Robert Freeman: At the American Hotel in Auburn the prisoner cleaned the knives for the dining-room table. Was such a boy as others—not as lively as I have seen but playful sometimes. When ordered to do anything he seemed to understand it and do it. Since he came out of prison he appeared to be downcast. I spoke to him but he took no notice. Took hold of his hand and spoke louder and he said "How d'ye do."

William P. Smith: Was in the State Prison as foreman. Had charge of prisoner there. He behaved well with two exceptions. Once he had been greasing a pair of shoes and placed them on a pile of wood near to a stove. One of the other hands in moving the wood upset the shoes. He took a stick and struck the man on the head, who was lame for a week. The other was a dispute about some yarn, when he and another convict got to fighting. The keeper flogged him. Considered his intellect very low indeed. He knew very little, not much more than a brute or a beast. When I sent him to the shop by telling him two or three times where to go and what to ask for he would go and get

it very correctly. First time I saw him after he came out of prison, asked him how he did but he made no answer. Was told that he was deaf. Tried to get into conversation with him but couldn't make him understand. He appeared different—appeared dumpish. He seemed to stand around. Saw him in jail the first week in June; asked him about his health, he said it was good. Asked why he killed those people, he replied, "I've been to prison wrongfully five years. They won't pay me, the people, so I thought I'd kill somebody." Asked if he meant to kill one more than another, he said, no. Asked why he went so far out of town; he said, "Better chance to fight up there, wouldn't go in, couldn't see to fight; 'twas dark—looked up a street, saw a light in the next house and thought I'd go there—could see to fight." Asked if he knew he had done wrong, he replied, no. Asked if he didn't think it wrong to kill the child; he hesitated and finally said, "Well, that looks kind o' hard." Asked why he thought it was right; he said, "I've been in prison five years for stealing a horse and I didn't do it and the people won't pay me—made up mind ought to kill somebody." Asked if he was sorry, he said, no. If he knew there was any such place as hell, where they punished those who steal horses and kill; said he didn't think there was. Asked if there was any such place as heaven where people went who do well; said he didn't know as there was. Asked if he was in jail or in the State

Prison; thought ne was in jail but wasn't sure. Asked if he knew what he was confined there for; said, "No." How many he intended to kill, said, "All I could." Said he meant to fight and kill until some one killed him. Asked if he expected anyone would kill him, he said, "Thought likely there might." Asked if he had been to Tyler's house; he said, yes, couldn't find him. If he would have killed Tyler if he had found him; he said, yes. There was a change—a sensible change in the man. He didn't appear to know so much; to have as many ideas about him; as many looks of intelligence. There was a slowness—dullness—he was slow and short to answer. I thought what little intellect he had seemed to sink lower down from some cause or other. His physical strength and vigor were good in the prison. He appeared active, stout, strong and energetic. Now his manners appear more dull, stupid and inattentive.

Cross-examined: In prison didn't see anything to lead me to believe he was crazy. Have not formed any opinion as to his sanity. There are some things that go to show that he was insane, and some to balance them on the other side. Asked how much pay he wanted. He said, "Don't know—good deal." Asked him if I would count him out a hundred dollars, it would be enough. He said he thought it wouldn't. Asked him how much would be right. He said, "don't know." He brightened up, and finally said he thought about a thou-

sand dollars would be about right.

Horace Hotchkiss: Knew the prisoner in the prison Sabbath school. His knowledge was very little. Endeavored to teach him to read—could see no progress. Asked him what would become of him if he was found guilty and executed. Said he'd go to heaven because he was good. He said something about pay—asked who owed him; he said, "Everybody."

Sally Freeman: Am the mother of prisoner. At nine years of age he went to live with Captain Warden, then with Mr. Ethan Warden; after that with Mr. Cadwell two years. About six years ago he went to the State Prison. When he was young and before he went to prison he was a very smart child, always very playful and good natured. About understanding things he was about the same as any other child. Never knew he was foolish or dumpish before he went to prison. After he came out of prison he didn't act like the same child—he was changed and didn't appear to know anything; didn't see any cheerfulness about him. When I asked him a question he would answer, but that was all he would say; appeared very dull, never asked me any questions, only if I was well. From that time to this he has never asked me any questions at all—has never offered to say anything to me except when I asked if he could get work, then he wouldn't say much. I don't think he has been to see me more than six times but have met him in the street and spoke to him. When

he came to see me he would ask how I did and then sit down and laugh — what he laughed at was more than I could tell. He laughed as he does now. There was no reason why he should laugh. He was laughing to himself. He didn't speak of anything when he laughed. Didn't think he was hardly right and he was so deaf. Asked how he got deaf, he told me his ear had fell down or some foolish answer. When he came to see me he generally sat still. I went to see him in jail the first of June. He laughed when I went in and said he was well. Asked him if he knew what he had been doing; he stood and laughed. Asked how he came there; he didn't say much of anything but stood and laughed. When I went away he didn't bid me good-bye nor ask me to come again. Don't think William is in his right mind nor that he has been since he came out of prison.

Cross-examined: The change I noticed was, he acts very foolish and don't seem as though he has any senses. I have three children—have had five, but none of them are crazy but this one. My name was Sally Peters; I was born in Berkshire, Massachusetts. Some of my ancestors were red people—of the Stockbridge tribe. William is part Indian and part Negro.

Deborah De Puy: Knew William before he went to prison. I associated with him. He was as bright as anybody else—very cheerful. Have been with him to balls and rides. He acted very smart on such occasions. Talked with him often, never

discovered any deafness or lack of intelligence. After he came out of prison there was a change. If I talked to him very loud he would talk, say very little only to answer me. He didn't act cheerful, but very stupid—never said anything until I talked to him. Never talked to me as he did before he went to prison. He had a strange smile. He would laugh very hearty without anything to laugh at. He wouldn't know what he was laughing at. He knocked at the door; I'd let him in and he would sit down and laugh. I'd ask what he was laughing at. He said he didn't know. When I asked him questions, he would either answer "yes," or "no," or "I don't know;" asked him how his hearing was hurt, and he said they struck him on the head with a board, and it seemed as if the sound went down his throat. Don't think he is in his right mind now, nor that he has been since he came out of prison. The reason is that he never used to act so silly and sit and laugh so, before he went to prison.

Cross-examined: My husband's name is Hiram DePuy, we live together. I don't know as it is anybody's business whether we do or not.

Mr. Van Buren: Do you recollect when you were married? Do you suppose I'm going to answer such questions? Yes. Well, suppose I shouldn't. I think you had better tell me that Deborah. I shan't answer such foolish questions. I shall have to insist upon your answering me now.

THE COURT: The witness must answer.

I couldn't tell you where I was married. Can you tell who performed the marriage ceremony? I couldn't.

Adam Gray: Known prisoner seventeen years. He was a smart boy—very active. Always thought him a pretty cunning kind of a boy. Think there is a change in him. Doesn't know as much as he did before he went to prison. Don't seem to talk as much, have so much life, nor seem so sensible. Last winter he boarded with me. He would get up nights, late, take his saw and go out as if he was going to work, and come back and go to bed. He would try to sing, but I couldn't understand what he said. He made a noise appearing as if dancing. Never saw him drunk but once.

Cross-examined: The time I speak of his being drunk, don't say he was drunk, but he came in and out, and hallooed, stamped, and went on; stayed around an hour, and went to bed.

Theron Green: Was keeper in Auburn State Prison; called a half-pay man. Worked at blowing the bellows at the forge. His way was slow, awkward, dull, downcast; would have freaks of laughing; couldn't tell what he was laughing at. On Sundays tried to instruct him in his cell but with poor success. He was very ugly, irritable, malicious and bad tempered. Hadn't enough intelli-

gence to warrant me in punishing him for violating the rules. Think he had as much capacity as a brute beast—don't know as he had more—none to spare.

Philo H. Perry: Have seen prisoner and tried to converse with him. Also heard Gov. Seward attempt to converse with him but to little purpose; did not seem to know about a court or trial or witnesses or a jury. Think he has no idea of the enormity of his offence, although he may know what he was doing. He has scarcely any intellect and is almost an idiot. Asked if I should tell the jury that he was crazy, he said, no. If I should tell them he was sorry, he said, no.

Dr. Charles Van Epps: Reside in Auburn; am a physician. The species of insanity with which he is afflicted came upon him in a very short period of time. It is possible for dementia to happen suddenly. Those who have this sort of insanity generally have thicker skulls than other people, and as they do not grow as fast as other parts of the body, a pressure on the brain is produced, which induces insanity. Dementia comes, however, from many diseases which are gradual. Knew prisoner until he was three or four years old. He then appeared as bright and intelligent as children generally at that age. Now he appears not to have the intellect of a child of five years old.

The Attorney-General:—I object to any testimony relating to this prisoner, derived from examinations since the verdict of the jury upon his present sanity. That question has been settled by a verdict.

The Court decided that the question of present sanity had been

tried, and a verdict rendered on the sixth day of July, instant, and that the question of the present sanity could not be again re-tried; that the question now on trial in connection with the murder, was whether he was sane at the time of the commission of the crime; and that the evidence of insanity must be confined to facts before and at the time of committing the act, up to the sixth day of July, instant, when the verdict of sanity was rendered.

Dr. Van Epps: I think he was insane at and before 6th July. Ground this opinion upon the history of the man, and what I myself knew of him. His senses have decreased from childhood—and that is evidence of insanity. He has been under an impression that he ought to have pay for the time that he was in prison, and that somebody owed him, and I have not been able to make him believe to the contrary. That I consider an insane delusion. He has an impression that every body is against him, and that was why he wanted to kill somebody. He had nothing in particular against Van Nest, yet insane people generally kill their best friends sooner than they will their enemies. He thinks he can read but cannot. He is under a delusion in that; yet he appears to be anxious to show us that he can read. His smile and his general deportment is like persons who are demented. I call his insanity dementia, or that species of insanity which is accompanied with a loss of the intellect. Idiocy is a perfect loss of the intellect, and where it is not congenital it is called dementia. There is some intellect left in the prisoner, and therefore his case is partial dementia. As to the design and calculation, I have known insane men to do acts evincing

more than ordinary design. I have heard of nothing connected with the murder of Van Nest, that an insane man would not be likely to do.

Cross-examined: Prisoner's mother used to be an intemperate woman—she lived with me awhile.

James H. Bostwick: Am a justice of the peace. He called upon me for a summons for a man for whom he said he had sawed wood. I knew the man—told prisoner there must be a misunderstanding; and I saw the man and found what it was. Declined issuing the summons. A day or two before the murders he came and said he wanted a warrant. Asked for whom. He said, "For those who got me to prison;" that he had been there wrongfully and wanted pay. Asked who the persons were. He said a widow woman and two men; and he mentioned David W. Simson, a former constable, as one of them. Asked what he was sent to prison for, he said, "They said 'twas for stealing a horse." Asked if he did steal it, he said, "No, I didn't." Told him he had no remedy—that if those persons swore false it was now too late to punish them for it. He said he thought it was hard that he couldn't get pay for his time and turned and walked down stairs. He was lodged in the jail unhurt except the

wound he had on his wrist. Next day I visited him at his cell, asked him if he desired counsel; he said, yes. Asked if he knew who were the persons who put him in prison; he said the widow Godfrey, David Simpson and Jack Furman. Jack was the man who was arrested at the same time and who turned State's evidence and got clear. Jack is now himself a convict.

Cross-examined: He was angry that the man for whom he had been at work would not pay. Found that the man had credited John DePuy for the work but after I had talked with him he said he would give the prisoner something. He told me that he was arrested on a canal boat; said that Vanderheyden arrested him again and pretended that he had arrested him for stealing hens. The day of the preliminary trial, in the jail, asked him if he didn't know it was wrong to commit these murders. He said, "I suppose it was." Asked if he was sorry, he said, "I was sorry when I got to Syracuse," where he was intending to go when he stole the last horse. He said, "The most I cared for was to get out of the county." Asked what he killed those people for. He said, "I couldn't get any satisfaction and I meant to be revenged."

Michael S. Meyers: Was District Attorney when the prisoner was indicted and tried for stealing the horse. He looked younger and brighter than he does now.

Cross-examined: There was nothing peculiar about him

then. Have never discovered anything to make me believe him insane.

James R. Cox: Saw prisoner about eight in the evening of the murder; he was walking and had a stick in his hand partly concealed under his coat. Have since asked him why he didn't kill me. He said "I thought some of it." Think he approaches an idiot. If he ever had much brain I should think it had decayed.

Dr. Amariah Brigham: Have charge of the State Lunatic Asylum at Utica. Visited prisoner several times, conversed with him, and listened to the conversation of others. Heard the testimony given on the preliminary trial and all that has been given on this. Believe the prisoner to be insane. I satisfied myself that he was not feigning insanity. I asked him what he could prove in defence of himself. If we should say he did not kill the folks? He said, quickly, no. Asked if we might not say so; he said, "No that would be wrong. I didn't do it." Someone then asked him if we might say he was crazy. He said, "I can't go so far as that." Asked if he was sorry for the act; he sometimes said no and sometimes, "I don't know." Whether he was sorry he had killed that little child; "I don't know" and "You may say that." That peculiar palor, which often times attends insanity cannot be so easily detected in colored people as in white people. The prisoner was predisposed to insanity. Some of his ancestors have been and one now is insane. There is no disease so

likely to spread in families in which it has once appeared. About one-half of the insane have, or have had, insane ancestors. In doubtful cases of insanity the fact that insanity prevails in the family of the person, is entitled to great weight. The prisoner seems to have been an active youth, with perhaps not quite as good an intellect as the majority of colored persons of his age; he seems to have been left to the indulgence of his passions, without mental, moral or religious culture. That, in my opinion, was one of the predisposing causes of this man's insanity.

At a very early age he was confined in the State Prison, where he had various troubles, and was thought by some to be a singular being, and, as some expressed it, a brute. He was disobedient, and for his disobedience was punished severely. He got into a violent passion for very trivial causes; was apparently ready to kill a fellow convict for moving his shoes, and acted in the manner I have been accustomed to see crazy people act. In the prison he seems to have become deaf. Deafness, however, is not of itself a symptom of insanity, yet it is often a concomitant, and their combination forms incurable insanity. When combined, I have never known a patient to recover. The reason probably is, that the same cause which destroys the hearing, or affects the auditory nerve, extends also to the brain itself.

He then came out of prison, and so far as I could gather from all the testimony, he was changed. He was a lively, ac-

tive, sociable lad when he entered the prison, but was taciturn, dull and stupid when he came out. This I regard as a characteristic of insanity. So common is this change of character in insanity, that many regard it as necessary to the definition of the term. A prolonged change of character, without any evident external cause, is given, in many works on insanity, as a characteristic; and the cases are almost innumerable where such changes have come within my own observation. He had disturbed nights, often was up in the night and was noisy. Than that, I know of no better evidence of insanity. Have spoken of it in a published article on insanity as one of its most indubitable symptoms. In some cases insane persons sleep well, but in general the insane have paroxysms and are apt to get up nights. His going to a magistrate for a warrant, without any definite notion for whom; declaring that he would have one, after he had been told that it could not be issued; his tender of twenty-five cents; his getting into a passion in the office of the magistrate; his inability to give any connected account of the injury of which he complained, and for which he wanted the process,—all indicate an unnatural, if not irrational, condition of mind. The dreadful tragedy, bloody as it was, and deplorable as it may be, I cannot but regard it as the result of insanity. Similar cases have occurred in lunatic asylums, but I am not aware that history records any case of the kind happening else-

where. I have always observed that the insane act much quicker than the sane. They will tear their clothes into inch pieces, destroy their beds, and break their bedsteads, in a period of time so short that one could not suppose it possible for them to have done it. Here the prisoner must have entered the house, went into different rooms, had some scuffles, killed four persons, looked into various windows, stolen a horse, and rode it half a mile before Williamson had walked that distance. It seems as if he had planned and designed it, made preparation for its accomplishment, indicating the possession of mind that some think incompatible with insanity. The insane are as adroit in planning and scheming to get away, or in accomplishing their purpose, as the sane. The case of Hadfield, for shooting the King, is in point. He had made a full and careful preparation, had obtained his pistols, and deliberately went to the theatre expressly to shoot the King. So with a patient at the Asylum at Utica, who had killed her father, and intended to kill her mother. She prepared everything beforehand.

That the prisoner undertook to escape, seems to many to be inconsistent with insanity. Yet, when I see patients every day doing wrong and adroitly contriving to conceal it; when I know that they have done the act; when I know numerous cases where such insane persons try to escape after having committed heinous offences, I do not think it ought to be so regarded. To many, the fact

that he remembers, that he gives a rational account of many things, and repeats them several times, carries the conviction that he is sane. Living, as I do, with those who exhibit as much intellect as any person in this assembly; whom I daily employ to write letters, to paint portraits, to play on musical instruments, to compose and deliver orations, which would do credit to men of learning and general intelligence; and when I know these people are as deranged on certain subjects as any person ever was, the fact that the prisoner remembers and repeats, does not carry conviction to my mind that he is sane. But the prisoner does not either remember or repeat well. He is dull, and stupid, and ignorant, and has but little intellect of any kind. All who have examined him have found it necessary to come down to simple questions in their examinations—to putting questions which we would not think of putting to a man we considered sane. Considered him a mere child in intellect. I agree that his pulse furnishes no evidence one way or the other. Whilst many insane persons have a very rapid pulse, that of others is too slow for ordinary health. The rapid changes, however, from sixty-seven to one hundred and twenty, betokens something not exactly healthy. The prisoner seems entirely indifferent to his fate, and yet has strong animal appetites. I cannot account for it on any other supposition than that it is the consequence of his disease. His counting and reading is another circumstance

worthy of notice; his insensibility to pain is another.

The external appearance of the prisoner in his cell, and as he sits at the bar, carries the same conviction to my mind. His total appearance—his abject and demented appearance, and his peculiar laugh, which all must have seen, although no one could imitate it, which comes on when nothing is going on that he appears to notice, are indicative of mental disease. When I see this every day, in demented persons at the Lunatic Asylum, and particularly on the Sabbath, when clergymen are preaching to us, I conclude that it results from disease.

It may safely be concluded that soon after the prisoner went to the State Prison, he became a little deranged—more of a derangement of the passions and feelings, than of the intellect, at first; the intellect finally took up the delusion, and under that delusion he tried to get pay. After he left the State Prison, tried to get redress for supposed wrongs, and the community not paying him as he supposed they ought, he committed this awful deed, under the strange delusion that if he killed around a while, as he tried to express it, they would pay him.

At any stage of this case, had it been submitted to me, I should have admitted him into the Asylum as a patient,

and should have assured those who brought him that his case was incurable. He is a most dangerous being, and ought never to be permitted to go at large again for a single hour. His flight is not any evidence to my mind, one way or the other. His eating at the time of his arrest, shows such a state of insensibility as characterizes the insane.

There is nothing mysterious about insanity when considered as a disease of the brain. It is such a disease; and I have never seen a case where, after death, marks of disease could not be found. It is, in common parlance, said to be a disease of the mind. But the mind is immaterial—if material, the mind would die. Being connected with the brain, whenever the brain becomes diseased, the mind becomes disordered just as the stomach becomes diseased when the digestion is bad.

Cross-examined: I think he had homicidal monomania; it is sometimes a sudden impulse; it is possible to tell when it is cured, but it is impossible to say whether it may not come on again. I think a man who had killed another and should be acquitted on the ground of insanity, ought not to be permitted to go at large. Ordinary people and physicians who have but little experience on the subject, could not judge so well in doubtful cases as one more experienced.

Mr. Van Buren: Suppose I should take this knife and kill one of the jurors, what would you say of my sanity or insanity? If you should get up and kill him and then sit down, in the absence of any other circumstance, I should think you insane.

If I should go out and steal one hundred dollars and then come in again and sit down, would you swear I was insane? Such a circumstance would, in you, indicate insanity.

If I should take a gun and shoot into the jury box and kill six of the jurors, would you say that I was insane? I answer as before.

If I should go down to the railroad bridge and saw off the posts, would you swear that I was insane? I think I should, because it would be so contrary to your character and what I have known of it.

Then if I do an act that you regard as being contrary to my character, and you can see no motive for the act, would you swear I was insane? It would indicate insanity.

Is insanity contagious? In some of its forms I think it has been contagious.

Is homicidal insanity contagious? I don't think that form of it is, yet I am always sorry to hear of one case for fear it will induce others to imitate it. In that way it may, perhaps, be called contagious.

Is suicide contagious? I think it was in the French army, until Napoleon put a stop to it.

Are hysterics contagious? They seem to be catching.

What is an insane delusion? An insane delusion is the mistaking fancies for realities, where the patient cannot be reasoned out of them.

Suppose that I should get an insane delusion that one of the jurors owed me and should kill him, would you swear that I was insane? I should think that you were.

Suppose that I should be told that a witness had sworn against me in a civil suit, and that the witness had destroyed my case, and I should go and kill him, what would you say to that? I should want to know how correctly you were informed.

Suppose I should be informed by Gov. Seward, who was counsel in the case? If it was him who told you so, and you believed it, and the suit involved a large amount, I should think you were not insane.

Suppose the suit were upon a note, and the witness swore to my handwriting only? If the suit were a small one, I should think you must have been insane.

Dr. John McCall: Am President of the Medical Society of the State. Have seen the prisoner and examined him as to his sanity. From personal observation and also from the testimony, I am of the opinion that he is insane. At first I did not know but that he might be feigning insanity, but subsequent examinations satisfied

me that he was not. He has not intellect enough, in my opinion, to feign insanity. His brain is diseased. Cannot say when it commenced, or what its first manifestation was. It has, in my opinion, been coming on gradually, and from the testimony, I conclude that it commenced in the State Prison. When, as in this case, there

seems to have been but little intellect, and the propensities and passions are left unrestrained, there is always danger that insanity will sooner or later occur. In my opinion that, together with the blow on his head, has been the cause of insanity in the prisoner.

I think that he committed the murder under an insane delusion, and by impulse. The same impulse was in some degree manifested in the prison, when he attacked the officer, and when he struck the convict who removed the shoes, at whom he threw a stick of wood. He seems to have thought that he had been wrongfully imprisoned, and that he was entitled to pay. The delusion about pay, it seems, gained an ascendancy over his mind, until it became the predominant feeling, and under an impulse he killed Van Nest and his family. He believed that he was entitled to pay from somebody—that it was due him. That was the delusion under which he labored, and did, when I saw him. His going to a house where people lived, against whom he could have no purpose of revenge, or discoverable motive for killing them all, is to my mind strong evidence of insanity. Perhaps if he had only killed Van Nest, there would have been less evidence of derangement; but the murdering of a whole family, and among them a little child, is a fact that shows to me that he must have been insane. He didn't want plunder. He took nothing, nor did he try to take anything from the house, or from the pockets of Van Nest.

Cross-examined: His head, in the region of the brain, is smaller than that of persons of his age who are healthy. His whole head is smaller than a healthy man of his age. It is smaller than Doctor Brigham's or the Attorney-General's. His body inclines forward and sometimes sidewise. His general attitude is unnatural; his arms are rather elevated. Don't think his leaning forward is because he is trying to hear, because he does so when there is nothing to hear. His position is peculiar to demented patients. In the strict sense of the term I should not consider insanity contagious, yet at times it is epidemic. It sometimes appears epidemic on the coming on of warm weather. There is such a term used as *cleptomania* and I think it may exist with him. The prisoner's case is one that could not be described by any one term mentioned in the books. Have read of similar ones but cannot find one exactly like it. I do not think as well of the classification of insanity by Hale and Blackstone as I do of that of Dr. Brigham. The prisoner's delusion is an irresistible impulse. This prisoner does not know what craziness is. He does not know that he is crazy. No logic could convince me that he is sane.

Dr. Charles B. Coventry: Am professor in Geneva Medical College. I have seen the prisoner and have heard the testimony respecting him. My opinion then was, and still is, that the prisoner is insane and has been for a considerable period of time. As to the

causes I find that the existence of it in his family was one probable cause, the neglect of all moral culture another, and his confinement in the State Prison another. Think the prisoner's case is one of partial mania with dementia. Dementia may come suddenly, but generally comes gradually. It is a common termination of mania. At the time of the murder, I believe the prisoner's disease was more of a mania than dementia, and that he had perhaps more intelligence than now, yet I don't believe, in reference to the act he committed, that he knew the difference be-

tween right and wrong. I never knew an insane person, unless he was totally deprived of intellect, who could distinguish between right and wrong. I think he has almost a total abolition of moral faculties, yet his is not strictly a case of moral insanity, because his intellect is impaired and his moral faculties entirely gone. He was under a delusion that he was entitled to pay and could obtain it by murder. I do not believe that it is a general delusion that prisoners believe themselves entitled to pay and that they can get it by murder.

Mr. Van Buren: How do you distinguish between a mistake and a delusion? In some cases it would be difficult to draw the distinction, but where the person imagines impossible things which he knew did not exist, it would be regarded as a delusion.

If a man think he is entitled to pay but cannot get it because he is not entitled to it, and seek redress, will that be evidence that he is insane? If a man should think himself entitled to pay and failing to get redress, should kill the first man he meets, it would be some evidence of insanity.

Would killing in such a case be murder? I think it would not.

Suppose the law made it murder? It would not be murder in fact.

Is not revenge a sufficient motive? It may induce the act but it is a reason that would not be adequate to a man of sound moral sense.

Have you not seen men who were indifferent about living? I have seen people when dying who manifested no interest in reference to death. But in those cases the mind had already become impaired. I have never known a sound mind that did not manifest some sensibility as to the result.

Dr. Thomas Hun: Am a physician at Albany; am one of the professors in Albany Medical College. Saw prisoner in his cell on fifteenth inst. Have not heard all the testimony.

Mr. Van Buren asked *Mr. Seward* what he proposed to prove by this witness.

Mr. Seward proposed to prove by this witness, that in his opinion the prisoner is, and was insane at the time of the commission of the crime.

Mr. Van Buren objected to the proof, on the ground that the verdict on the preliminary issue, rendered on the sixth day of July, instant, was and is conclusive that the prisoner was sane on that day; and that the same cannot be contradicted by evidence.

Mr. Seward proposed to prove by *Dr. Hun*, that from conversations with the prisoner since the fifteenth day of July, and from his personal appearance, and from what testimony he has heard, he believes the prisoner now insane, and that he was at the time of committing the act, for which he stands indicted.

THE COURT: The witness may give his opinion as to the sanity or insanity of the prisoner, upon facts within his knowledge, before the sixth of July, instant, or from the personal appearance of the prisoner; but not from any conversations with him since the sixth of July, nor from the testimony in the cause.

Dr. Hun: If I exclude what I have learned of the prisoner since the sixth day of July, I cannot give a positive opinion respecting him. From his appearance here in court, I would suspect him to be insane. Could not form any opinion as to whether he was sane or insane on the twelfth day of March. His appearance as he sits here in court, and the idiotic expression of his countenance, indicate insanity.

A young man brought up in

this community until he arrived at the age of twenty-three years, and who had learned his letters in the Sunday school, I could not believe would think he could read when he could not, or could not count twenty-nine.

Dr. James McNaughton: Am professor in the Albany Federal College.

Mr. Wright: What is your opinion as to the sanity or insanity of the prisoner?

The Attorney-General insisted that the examination should be restricted to a time antecedent to the sixth day of July, instant; and that the witness should not take into consideration anything he may have learned by or from the personal examination of the prisoner made by him since that day.

Objection sustained.

Dr. McNaughton: I cannot, of course, form a very positive opinion of the mental condition of the prisoner, from seeing him here in court. He appears to be stupid and foolish. Take him to be a person of very feeble intellect. His smile is idiotic—either natural or acquired. He may have always

been as he is now; yet if it appear that he had more intelligence formerly, I should conclude that it was not natural idiocy. If I knew nothing of him, I should from his appearance, alone, say that he was an imbecile. He is either idiotic or partially demented; I don't think he feigns.

IN REBUTTAL.

Nathaniel Lynch: Prisoner lived with me sixteen years ago; we couldn't keep him, he would run away every day. His mother was a drinking woman and we concluded we couldn't keep the boy. She is part Indian. He was almost always smiling and laughing and appeared to be a lively, laughing, playful boy. He grew out of my knowledge and I didn't know about him until last winter, then employed him to go with me about three miles after some cattle. Said I, "You haven't lived long in Auburn, have you?" He said he'd always lived here. I asked him his name and he said it was Freeman. I asked if he was brother to Luke; he said Luke was his uncle. He then said, "I've lived with you." Next day he sawed wood for me. I offered him fifty cents a day and handed the money. He asked five shillings per day and said he could get it elsewhere. Told him I gave only four shillings a day. He appeared to be quite put out, contended for five but took the four shillings a day and went away. Next saw him in jail after the murder, but before this court. I then asked him if he knew me. He said, "Mr. Lynch." I asked about the time he lived with me. He said, "I was quite a small boy." I asked if he got whipped. He said, "I did some," and described a whipping Mrs. Lynch gave him—how he ran away, and how he got on to the fence—then ran away until his mother brought him back. Asked him whether

I ever whipped him. He said, "You did once or twice, a little." Recollect of whipping him. He said the old lady cut his wrist bad. Asked how he came to kill the child. He said, "Was afraid it would make a noise" How he felt about killing the family. Replied, "It looked hard." What made him get such a poor horse. He said, "I was in a hurry, and didn't mind much about the horse." Asked why he didn't come to my house and see me. Said that he had got his wrist cut and knife broke, and he thought he'd go off till his wrist got well, and then come back and do some more work. In all these interviews I didn't think of such a thing as insanity. Aside from his deafness, I never discovered any want of apprehension in him. In jail I discovered no change in him. He is in the habit of smiling, and was last winter. He then stooped as he does now. Asked why he killed that innocent family, he said, "I've been in State Prison five years, and they wouldn't pay me."

Alvah Fuller: Was sheriff's assistant. Went for Dr. Fosgate to dress his wounded wrist; he said it hurt him. Asked if it pained him. He said it did some. When the Doctor came he asked the same question, but got no reply. Saw him in court during the trial of Henry Wyatt. While in jail I asked him if he had enough to eat. He said, yes. He asked me for tobacco, and I gave it to him. He told that Dr. Fosgate said he ought to

have a leather on his shackles—that the doctors said they might create inflammation, and his leg would have to be taken off, and it would kill him. I said to him, "Bill, you ain't afraid to die?" He said, "No; but I want to live a little longer." Never discovered any evidence of insanity about him.

Aaron Demun: Am uncle to the prisoner; made his home with me a good deal before he went to prison. He'd run away and then come back; was a rather wild boy, wouldn't remain long in a place. Did not see him in prison, but saw him after he came out. He came along to me and said, "Uncle Aaron, how do you do?" I asked how he did; he said, "pretty hearty." He didn't seem deaf. The next time I saw him was down at De Puy's; he there sat still and didn't say anything; saw him in the street after that; asked him where he boarded, he said at Mary Ann Newark's but that he didn't exactly board. "I bring my provisions and she cooks for me." Asked if he slept with her; he said, "No, she's a Christian and don't do no such thing." The day of the murder he asked for tallow to grease his boots. Told me he was going to hire out by the month with some farmer. Told him that was the best way. He said, "Uncle Aaron, you've a good place here. Are you to work here steady?" I said yes. Told him that if he didn't get more than seven or eight dollars a month, to take it. He talked as rational with me the day of the murder, as he ever did. He always had that smile, and

that down look. His grandfather had that same smile. See no change in William, only that he has grown larger and older, and is deaf.

Cross-examined: His father had the same smile on his countenance. He lived with me when he was nine years old. Had no dependence on him—he would run away.

David Mills: Knew prisoner in the State Prison. His conduct was very good. Didn't discover anything about him indicating insanity. There was always a smile on his countenance; would smile when there was no occasion for it. Looked a little pale but I never saw anything that induced me to think he was not sane.

Dr. Jedediah Darrow: Am a physician. Examined the prisoner in the jail; concluded that his memory was good. Discovered nothing that indicated that there was insanity about him.

Cross-examined: Have not read anything upon the subject of insanity for a great many years. My opportunities for observing insanity have been very limited. Could not say what form of insanity the patient had. Do not give a professional, but only a common sense opinion. Asked him nothing about the tragedy.

Israel G. Wood: Prisoner worked for me before he went to prison; was a good boy to work and would do about as I told him. Have a distinct recollection of his appearance then—cannot see any difference in him now. He never held up his head, he stooped and never

was much of a talker. Never knew of his asking any questions; he would always smile when he was asked questions. The old man would smile like him. Was jailer when the prisoner was arrested for stealing a horse. He broke jail and got out and let another prisoner out. He broke the lock with the handle to a shovel. Took him at Lyons and brought him back. When he was arrested he gave an account of the whole matter and which way he went. Since his arrest for the murder he has told me the same story. Talked with him a good deal, it is my opinion that he is not crazy.

Benjamin Van Keuren: Was foreman in the prison. Prisoner was a middling kind of a workman, sometimes pretty good, sometimes contrary and stubborn. There was nothing very peculiar about his conduct; sometimes he was saucy. He wanted a new file, said to me, "You must be a fool to s'pose a man can do as much with a dull file as with a sharp one." Told him I should report him; he said, "Report and be damned." Reported him to Captain Tyler; he took him to the wing and punished him by showering. After that he would look up and grate his teeth at me. Don't think Tyler hurt prisoner; can't see any difference in him between there and here. I never thought he was crazy—don't think he is now. He smiled in prison.

Cross-examined: I think Tyler struck as hard as he could, but I don't think such a board ever broke anybody's skull. Have seen a nigger here in town

break a two-inch plank by butting his head against it.

Daniel Andrus: Knew prisoner before he went to State Prison. Never noticed anything very peculiar about him. He was a boy of small mind and rather bad temper. After his time was out in prison he came to my office. I had acted as his counsel on his trial. I then conversed with him about his going to the State Prison; he answered my questions as readily as he did before he went to prison. He complained of the keepers, said they got a pique against him and punished him when he did not deserve it. During the Wyatt trial saw him here in the court house. He seemed to be paying attention to the trial as others were. Robert Freeman was also in court. Saw prisoner once in the jail; he looked at me smilingly, and asked me if I would give him some tobacco. He is some deaf, yet I have no doubt but that he can hear me when I speak now. I was sitting near him during this trial one day, and when about a foot from him, I whispered, "Bill, do you want some tobacco," and he turned his head toward me and nodded assent. He carries his head more on one side than he used to; for then he was pretty erect. Don't recollect about his smile.

Cross-examined: Have not the least agency in the prosecution of the prisoner. Was one of the triors appointed by the court and was a witness on the preliminary trial.

Walter G. Simpson: Have known prisoner ever since he was a small boy. His appear-

ance was downcast and he carried his head forward. Think his appearance now is very much the same. The smile I think is now very much as it was before. Have not seen anything to make me think him insane.

Louis Markham: Have known prisoner twenty years. He was a smart boy, pretty active and quick. He was rather retiring and hardly ever commenced conversation. His personal appearance was very much as now, only he has grown older and large. Was here when he was tried and was one of the jurors. Recollect well how he looked as he sat in the criminals' box. Did not notice any alteration while he was in the prison.

Cross-examined: Harry Freeman, when he was sober, was a very sensible man. When he met me he always smiled the smile of recognition. His hearing was I believe good—was a sprightly, lively, playful boy.

Stephen S. Austin: Saw him in jail when he was there under arrest for stealing the horse. He was a troublesome, quarrelsome fellow. His personal appearance and manner was very much as now—he was blacker then than now—heavier now than he was then. Recollect that he fought with a boy in the jail and flailed him. Never discovered any insanity in him nor did I ever suspect any. It is my opinion he is not insane. Have seen insane persons, and have taken care of them. After the story got around that the prisoner was crazy, I asked John De Puy one day if he thought him crazy. He said,

"No; he is no more crazy than you or I, except when he is drunk. Then he's an ugly little devil, and I was always afraid of him." He then told about his having a knife at a ball, and that he, John, blamed the negro for not telling him of it. He said the prisoner had threatened to kill him, and he blamed Hersey for not telling him of it.

Cross-examined: They were talking about hanging him, and stoning him to death, when I said the poor devil wasn't worth the powder and shot to shoot him. Saw stones and missiles thrown at him. Found but very few who were not for killing him on the spot. Made the remark in the presence of people who were talking of lynching him. Assisted on that occasion. Didn't think it right to shoot him.

Abram A. Vanderheyden: Went after the prisoner at the time of the murder, and assisted in bringing him back. Have had process for him several times for petit larceny. First for breaking open a pedler's cart. Also on a charge of stealing hens. First time, found him at John De Puy's, under a bed. That was before he was taken up for stealing the horse. When I said I had a warrant prisoner said it was a damned lie—that I had no warrant for him. Found a bottle in his pocket. When I arrested him after the murder I asked him how his hand came hurt. He said, "Stabbing—stabbing." Asked how he came to commit this crime, said, "I don't want you to say anything about it." I said to him that

we were alone and he might as well tell me how he came to commit the act. He replied, "You know there's no law for me." I asked what he meant by that; he said, "They ought to pay me." I asked how he came to kill the little child; he said, "Didn't know as 'twas a child."

Cross-examined: He has always denied stealing the horse. I never believed that he did, and I believe that is the general opinion.

Aretus A. Sabin: Have known prisoner; always took him to be a downheaded fellow. Assisted in getting him into jail and talked with him after he was in his cell. The substance was that the persons he had killed were the means of getting him into the State Prison. I told him they were not—he made no reply. I think there is some resemblance between his smile and that of his father's. Never considered him insane.

Cross-examined: Saw him in prison before his striped dress was put on. Told him I was sorry to see him come in so young. He wept.

Jefferson Wellington: Knew Freeman as a boy—he was a pretty ugly fellow. I lent him an umbrella and he did not bring it back. Told him if he did not I should whip him. He did not and I whipped him. He then threw a flat-iron and then threatened to kill me. He was sociable, about like other boys.

Jostah Sherwood: He was a still boy and spoke only when spoken to. He was always crooked; his head inclined for-

ward. Do not discover any difference in him except his deafness. Never discovered any insanity about him.

Thomas F. Monroe: Am police officer in this village. At seven years he was stout and springy and ugly-tempered. Have seen him throw stones at other boys. Have seen him smile a good many times, and cannot see any difference between his smile now and as it was then. After the murders, I had a conversation with John De Puy about this prisoner, in which De Puy said he was not crazy. Never saw any insanity about the prisoner. Never suspected it, nor heard that any body else did, until after the murders.

Cross-examined: He was quite quick and active; not much different from other black boys. He was ugly, and about the ugliest boy I ever saw. Don't think his appearance is as intelligent as that of colored people generally. Think he is as intelligent as the middle class. Think the prisoner can hear; think he has heard my testimony.

Silas Baker: Did night duty in the State Prison. Never knew that he was disturbed of his rest in prison. I punished him twice in prison, once for striking another convict, and once in relation to hanging out yarn. His appearance in the prison was much the same as now.

Cross-examined: I saw him smile in the chapel as he does now and without any apparent cause.

James Parrish: Was at work at the dye house in the prison when the prisoner was there;

don't see any material difference in him now from what he was then.

John P. Hulbert: Am a counselor-at-law. In the jail heard conversation between him and Dr. Fosgate. He asked if his arm did not pain him; he said it did not much. Did not see anything that led me to believe that he was insane. Was here last winter during the trial of Wyatt for murder; my impression is that he was there.

Augustus Pettibone (recalled): Am the keeper of the jail where prisoner has been confined. Have not discovered any insanity about him. Have heard no disturbance from him nights, except one night when I forgot to give him his bedding. He then rattled the chains and knocked against the wall. He has always eaten his rations well and been in good health.

Cross-examined: Is chained to the floor. The floor is stone and he was left that night accidentally without bedding.

Robert Simpson (recalled): A day or two previous to the murder prisoner came to me to get a knife ground, and ground it himself. Do not know whether he fitted the knife to the stick at my shop or not.

Benjamin F. Hall: Am a counselor-at-law. At the request of the magistrate, went with others to the jail, to aid in repressing any disorder that might arise, and preventing any violence to the prisoner, when the officers, who were near at hand, should arrive with him. An immense concourse of people had assembled about the jail, and many apprehended

that an attempt would be made to rescue the prisoner from the officers, for the purpose of punishing him summarily, for killing Van Nest and his family. Upon the arrival of the officers with the prisoner, I saw him, and assisted in lodging him in jail. Was requested by Dr. Spencer to interrogate prisoner. In that examination did not discover any form of insanity that I am acquainted with. His mind is of a very low order and quite feeble, but I did not discover from his manners or answers that he was deranged.

Rev. Alonzo Wood: Am chaplain at the State Prison. Saw him the Monday evening preceding the murders at a barber's shop, in town, where he requested to have his whiskers shaved off. Never saw any insanity about him. When he left the prison he appeared to feel well. When in there he made some music and fun about him. Noticed no stupidity or dullness.

Cross-examined: Saw him at the time of his discharge, and expressed the hope to him that he would so behave in future as to never be imprisoned again. Whilst in prison, I asked him if he wanted a Bible. He said that it would be of no use, as he couldn't read. After being dressed to leave the prison, he was taken to the clerk's office, where a check was presented to him to sign; but he declined signing it. He was paid three dollars. He said he had been imprisoned five years unjustly, and he wasn't a going to settle so. The clerk told him he could not have his money unless he signed the receipt. He said that

he couldn't write. The clerk told him that he must make his mark. He then did so, received his money, and went away.

Harry Lampkin: I keep a public house. About two weeks before the murder, prisoner and three other black fellows came to my house, on Sunday. They put their horses under the shed—stayed about half an hour, and went away. Prisoner appeared sulky. Untied the horses, paid the ostler, and appeared to be driver. He came in and got some change at the bar, and ordered some liquor to drink, and they drank around. Didn't see anything crazy in him.

Cross-examined: I testified before, that it was beer. We call everything beer, now-a-days, as it has to be beer before it's any thing else. They drank beer once or twice while they were there and my bar-keeper says they drank liquor once.

Dr. Charles A. Hyde: Am a physician and surgeon. Have visited the prisoner twice in the jail; saw nothing in him there to make me think he was insane.

Cross-examined: He appeared dull and stupid and disinclined to talk much, yet in all that I saw I discovered no insanity. Have seen many cases of insanity but my opportunities for treating it professionally have not been very extensive.

Dr. Samuel Gilmore (re-called): Have seen the prisoner in jail, heard the material parts of all the testimony, heard the prisoner read and count as spoken of by other witnesses. My opinion is that he is not insane.

Cross-examined: Think his preparation of the knives, and the concealment of them, and his going in the night, indicates forethought, calculation and intelligence, which are indications of sanity. He seems to have planned the homicide with as much skill and care, and carried it out as well as any sane man could. The murder does not indicate insanity, but it does indicate great depravity. His inability to read or count well, indicates ignorance. He may not be as intelligent as negroes generally, yet he must have known that it was wrong to commit murder.

Dr. Joseph Clary: I have visited the prisoner three times for the purpose of examination. Have seen so little of insanity that I don't know as I ought to express an opinion. I think nurses and those that attend the sick, will sooner discover insanity than others. From what I have seen of him it is my opinion that he is sane.

Cross-examined: He may be insane. My examination of him has not been such as to enable me to give a confident opinion. Have seen dementia only in old age.

Dr. David Dimon: Am a physician; have seen the prisoner several times since he has been in jail. In these examinations and his general manners and appearance, discovered no evidence of insanity. He is ignorant and depraved, yet I was unable to discover wherein any of his faculties have been disturbed. His mind is now in the same condition that it has been since he was a boy. Dis-

covered nothing about him indicating insanity.

Cross-examined: Have seen many insane persons but have not had much experience in treating insanity. Have never treated a case of partial or general insanity, professionally. Admit the principle of moral insanity as a disease of the brain. It is my opinion that his moral powers now are as they were by nature. He has a very low grade of intellect and is very ignorant, but that is not insanity. I should not think he has as much intellect as an ordinary child of fourteen years of age. In some respects he would hardly compare with children of two or three years. An insane delusion is the thorough belief of something in opposition to the evidence of the senses.

Dr. Sylvester Willard: Have been six or eight times into the jail to see the prisoner for the purpose of ascertaining his mental condition. I told him to go on and tell me the whole story, which he did. Asked what he went there for. He said, "I went there to kill them." Asked what he did when he first went there. He said, "I saw a light in the house, and didn't go in when I first went there." Asked what he then did. He said, "I stayed out round the house." I asked how long he stayed. He said, "I stayed a little while, until I saw a man come out and go away; then I went into the house, and saw Mr. Van Nest." Asked what he did then. He said, "I stabbed him." I asked if he killed him. He said, yes. I am not able to

give all my questions and his answers. Asked how many he killed. He said, "I killed five." Asked whom. He said, "Van Nest, his wife and child, and the woman at the front gate. Asked how many he meant to kill. He said, "All I see." Asked what made him stop. He said, "I got my hand cut and couldn't kill any more." Asked how he got his hand cut, and who cut it. He said, "The woman at the gate." Asked what she cut it with. He said, "With my knife. I s'pose the piece that was broken off." I asked how she came to cut it with his knife that was broken off. He said, "I s'pose she pulled it out of her body. I meant to kill her." Asked why he didn't kill her. He said, "I didn't like to go into the house in the dark." Asked if it did not look hard to kill those folks. He said, "It looked hard." Asked what he did after that. He said, "I rode down back to Auburn—the horse fell." I asked what he did then. He said, "I stabbed him, cause he hurt my leg." Asked if he knew what they did with people that murdered. He said, "They hang 'em. I don't think they will hang me." Asked why he killed those people. He said, "Because they put me in State Prison, and I couldn't get my pay." Asked if he thought Van Nest put him in prison. He answered, no. Asked what made him kill those innocent people. He said, "I meant to kill every body."

After getting these matters of plain relation, I undertook to excite his fears. I then said to him that they were going to

hang him, and that we had come as his friends to see if we could do him any good. I asked him what word we should carry back to court. He said, "I don't know." I asked him to tell us something. He said, "Don't know." I asked if we should not tell the court that he didn't do it. He said, "No, that wouldn't be right." I handed him a dollar bill and asked how much it was. He told me rightly, and the same in regard to a three-dollar bill, but a ten-dollar bill he called one. I did not find evidence sufficient to make me think him insane.

Cross-examined: I said, "The doctors want your bones and want to know if you are willing that they should have them. What do you think about it, Bill?" His reply was, "I don't think much about it," and to the question repeated, he said, "I don't believe it." Asked him if he ever saw any bones—and he said yes. I asked where. He said, "In Dr. Pitney's office." I asked him again if he did not believe they wanted his bones and he then answered, no. Dr. Pitney as a medical man is very respectable and in surgery his experience is very great.

Dr. Leander B. Bigelow (recalled): Am now physician to the State Prison. Had a partial acquaintance with the mother of prisoner, a hard-working woman, but subject to intemperance. Jane Brown was a daughter of Harry Freeman. Never heard of her being crazy, until this trial. Never saw anything to indicate insanity in her except ordinary intoxica-

tion. Have not seen Sidney Freeman much of late years; think him an insane man from the singularity of his delusion. He imagined that Jesus Christ was in his throat, choking him. Do not discover anything that I consider an insane delusion in this man's case. Should not think him insane from his manner of counting. It might be from want of education. Have seen this smile continued to a pretty hearty laugh; did not consider it an idiotic laugh. We both laughed at the same thing. Prisoner's grandfather is a very pleasant man and never speaks without smiling. His getting up nights while at John De Puy's, without any other circumstance, would be to me an evidence of insanity; but taking De Puy's testimony—his going to different persons and telling them not to let him have liquor, is an evidence that he did drink, and of his getting up to drink and being intoxicated. He remembers as well what occurred five years ago as five days. My impression is that he knows what is going on in court. Have no occasion to suspect that he has answered me otherwise than honestly. Can't say I think he has answered me freely. Heard Mr. Austin's testimony. Think he either misrepresented to Mr. Austin, or had forgotten. Have no doubt of his ability to detail the facts of the murder. Am satisfied that he is in an ignorant, dull, common, stupid, morose, and degraded negro, but not insane.

Cross-examined: Was requested by Dr. Pitney to go to the jail, who said Mr. Seward

wanted him and some other physician to go and examine the prisoner.

Re-examined: Have known men in prison, over twenty-three years old, who could not multiply two by four, and who could not read. I have seen both white and colored men in that condition. A few days since, examined a prisoner Madison. A negro of twenty-four. Asked him to let me hear him count. He said, "twice ten is twenty—three times ten is fifteen." Asked him how much two times four was. He said, "It would be nine." Asked how many days there were in a week. He answered, six. Asked how many shilling there were in a dollar. He said, "I couldn't tell that." Asked how many days there were in a month, and how many cents there were in a shilling, and he made the same answer. Asked how many hours there were in a day. He said, "I don't know, sir—I couldn't tell." He counted up to thirty regularly, and then said, "forty, fifty, sixty, seventy, eighty, ninety, sixty, forty, forty-one, forty-two, forty-three, forty-five, forty-seven, forty-eight, forty-nine." Then said, "then what?" He replied, "I don't know—I can't make it out." I asked how many quarts were in a gallon. He said, "I can't tell." I asked how many pecks there were in a bushel. He said, "I guess it is three pecks—three or four. Let me see—I believe it is two pecks in a half a bushel. I guess it is four pecks in a bushel." I asked how much six and seven were. He said, "It would be thirteen." I then asked him to

count again. He began with "ninety," and continued, "thirty, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, forty, fifty, sixty; that's as far as I went the first time—I can't go no further. Stop—I can go one more—sixty, sixty-one, sixty-two, sixty-five, sixty-seven—there, I won't count any more. That's as far as I went the first time, and I made a balk." The other was a white man, Miller, age twenty-nine. Asked him if he could read. He said he could. Asked him to call over the letters of the alphabet. He called them correctly. I then pointed to this sentence—"The old Romans used to write in the Latin language." He then began to read by saying, "T-h-e o-l-d R-o-m-a-n old man u-s-e-d seat t-o w-r-i-t-e church in t-h-e L-a-t-i-n tin l-a-n-g-u-a-g-e Jesus." I asked him if he could count bills. He said, "I can't count one bill from another." He said nine and nine were nineteen, and that six and five were fifteen, and that seven and eight were eighteen. He said three times four were thirteen, and counted to forty-five, and from fifty to seventy-nine correctly; but he could not count correctly to one hundred. He didn't know how many pints there were in a quart, nor how many pecks there were in a bushel. Have no doubt, whatever, but that the prisoner is sane.

Dr. Thomas Spencer: Am professor of medicine in the Medical College at Geneva. The facts as to the reading lessons, the cyphering lessons, as to the murder, and the reasons he has

given for it, such as revenge, connecting it with pay for his time in prison, I have heard gone over; have ascertained that he has slept well, eat well, and has been in good physical health generally, and, after due deliberation, have come to the conclusion that the prisoner is sane.

Insanity is the deranged, impulsive, incoherent, deluding exercise of some or all the faculties of mind; suspending the control of conscience, reason and judgment, over the thoughts, words and acts of the patient. Insanity, then, is a disease having symptoms—sanity, a healthy exercise of the powers of the mind. The essential point in insanity is a change—generally sudden, occasionally slow—in the action of the mind and body. 1. A change from himself, in comparison with himself. 2. A change as compared with the rest of mankind, of his own grade of mind.

In every form of insanity there is more or less want of attention and coherence of thought between questions and answers put to an insane patient. Finding in this case a general relation and coherence of thought between questions and answers as they have been made, the conclusion of my mind is irresistable that the prisoner's mind must be sane.

The faculties of the mind are: 1. The involuntary mind. 2. The voluntary. 3. The intermediate. The involuntary faculties I marked on my chart with the odd numbers, and they may be designated the odd, unbalancing, tempting, affective, and in-

stinctive faculties. Of these, I make sensation, hunger, thirst, love of society, children, money, combat, fame, nature's laws, love of divine things, revenge, anger, joy, hope, fear, self preservation. Between self preservation and the voluntary faculties, I place conscience, as the essential balancing faculty between the voluntary and involuntary faculties.

The most voluntary faculties are, attention, perception, memory, understanding, comparison, combination, reason, invention, judgment, sense of justice, pleasure in right, horror of wrong actions, attention, consideration, and will, and other volitions, mental and muscular. Will, I mark as the thirtieth faculty. As aids of conscience in regulating the voluntary faculties, I would name sympathy and sorrow, for human weal and woe. We have three other intermediate faculties, and which are the essential seat of insanity. They are conception, imagination and association.

All the faculties are united into one whole, as in health and strength they act together. I have, in an imaginary way, connected all as one whole, by telegraphic wires, and ready to act together from an imaginary centre—the will—simultaneously, for we know that as a whole they are united. At this point will be observed, what I call an imaginary centre—the will; all are acting under the influence of the will. [The witness here exhibited a chart to the jury.]

Conscience regulates the will whilst we are awake, and sane. When we are asleep, and insane, the thoughts may be con-

sidered as going around the will and conscience. The insane man is essentially a dreaming man awake. He mistakes his own fancies and imaginations for realities. The insane man makes the same mistake that a sane man does when dreaming. I mentioned as the three intermediate faculties, conscience, sorrow and sympathy. The upper ones are conception, imagination, and association, and are the essential seat of insanity of dreaming. They are the feeders of the mind. Conception is the thought-stating faculty of mind; the faculty which receives the impressions of sight, noises, touches, smells and tastes. Imagination is the thought-gathering, thought-grouping faculty—the storehouse of thought—the thoughts without order. However disorderly may be the thoughts in sleep, we view them as realities; so do the insane. Association is the thought-relating or thought-cohering faculty of mind. The derangement of these three intermediate faculties, between the involuntary, or least voluntary, and the voluntary, or most voluntary, constitute the essential elements of insanity.

The brain, the little brain, spinal marrow and nerves, are the instruments or media, connecting the mind with material things, and are the seat of the disease called insanity.

The facts detailed by witness Lynch show the healthful performance of the faculties of perception, imagination, and association. He recollected being whipped; he spoke of running away to his mother and other

matters. In insanity we almost always have strange sights and hear strange noises. We have negative evidence that the prisoner has seen very few strange sights, if any, and that symptom is therefore absent. As to strange noises, he does not hear any. With respect to thirst, I see no evidence of derangement in prisoner. I have compared the acts of the prisoner with the thirty-six faculties of the mind, and by the evidence, I will show them all to be in a healthy state.

To show that hunger existed, I refer to the evidence of his furnishing himself food economically, by moving to a house where he could provide for himself. That is as a sane economical man would do. He went out in search of labor precisely as a sane man would. The insane are exceedingly improvident. In respect to fear, hope, self preservation, the prisoner shook in jail and wanted counsel, but didn't know the lawyers. He also said that if they would let him go this time, he would do better in future. In this he also exhibited comparison—he would do better or righter. A man who knows what it is to do righter, knows what it is to do wronger. So also did the remark about the child being rather small. In giving the reasons for committing the murder, he spoke of having been in prison wrongfully, was agitated, and one witness thought he was going to cry. That exhibited a sense of injustice, and that that had not lost its influence on the pris-

oner's mind. His love of money was evinced on various occasions. He went to the justice to get pay from those who owed him. He hurled a two shilling piece at the man, which may be done by the insane or ill tempered. Combativeness was exhibited when he stoned the boys, and when he threw the flat-iron at the witness who whipped him. In the prison, he struck a man for moving his shoes. Struck a keeper twice, and afterwards went at him with a knife. This is one of the symptoms of homicidal mania, yet it is like the symptom of moral depravity. It shows a continuance of his old habits of mind, and is negative evidence that insanity does not exist, and positive evidence of moral depravity. Up to the time of this murder, I have not been able to find one single fact which shows insanity. The strongest evidences of insanity to be found in the prisoner, are his getting up nights, singing, dancing, and going through a mock fight, as if with his fellow men. On the preliminary trial, these facts led me momentarily to the belief of insanity. I entertained the pleasant belief that I could testify that he was insane, until I remembered having seen just such symptoms produced by intemperance.

I have heard the prisoner say he committed the murder from revenge. The idea of pay and revenge, associated, is the essential insane delusion, according to the learned doctors from Utica. But let us compare this with descriptions already given of insane delusions. An insane

delusion is one that is contradicted by the reason and sense of all mankind. How is this wrong belief here; is it an absurdity or an insane delusion? To determine this we must see on what it is founded. He says that he was imprisoned innocently. He says he didn't steal the horse. I conclude that he did not, and if he did not, then his assertion is true. It is a fact that he had been wrongfully imprisoned and had not been paid for his time. He believes he ought to have pay. If a man has worked five years for nothing it is not an absurdity that he ought to have pay. How is it here? Who ought to pay him? Against whom will he revenge himself if the people have not paid him? How will he get his pay? The idea of general revenge is associated with a true fact—that the whole people sent him to the State Prison. Admitting it to be right to revenge injuries, it was right for the prisoner to avenge himself. He confesses that it is wrong to avenge injuries; he confesses that he committed the crime; and can the conclusion be resisted that he committed the act knowing it to be wrong; that conscience was in operation?

He exhibits the faculty of attention. When a question was put to him he always attended to it, indicating that he apprehended it and showing that his faculty of perception was sane. He remembers, he understands and comprehends what is said. His answers correspond with the questions put when he has time for deliberation. To some extent he can

combine numbers—can tell a one, three and five dollar bill. As to the reason he gives that he could not get pay by revenge, it is either an insane delusion or an absurd reason; and to my mind it is only an absurd reason. He misjudged in reference to a true fact—that the whole people imprisoned him; but we are all liable to misjudge from false facts. It has not the character of an insane delusion; it is not founded on fancies or imaginations. It is but an absurd conclusion of a sane mind.

Having established, affirmatively, that all the faculties of the mind are healthful, I proceed to notice the facts showing the same thing negatively. In the books, we have mania, monomania and dementia. The negative proofs that dementia does not exist, are that the prisoner attends, comprehends, and, within the compass of his mind, reasons coherently. Monomania is characterized by some absurd belief, in fancy or imagination. A man believes his legs are glass. He will sit still for fear of breaking them. The preacher believes himself to have become an apostle, or the Saviour. Those are insane delusions. They contradict the reason and the sense. The monomaniac who has the homicidal propensity, is affected with these symptoms. He believes some unjust necessity requires him to kill his fellow—his father or his mother, perhaps, or his children—to keep one from starving, or to make angels of another.

The best authorities say homicidal insanity is always fol-

lowed by furious madness or by suicide. The sane generally make arrangements as to the instruments, time, place, and manner of escape. The insane do not. Prisoner was in a hurry at the moment of starting for the murder. That looks like an insane impulse; yet he was deliberate—he inquired if there were chores to be done before he left, and put some snow in the tub. This deliberation balances the insane impulse, for both do not go together. Again, concealment of intention is the leading symptom of the sane criminal; and disclosure of intention of the insane. He concealed his instruments—threw one out of the window—passing by the sleigh he had it under his clothes—he concealed various other movements in the construction of his knives—and then fled amongst strangers. Sane criminals generally conceal, until they become convinced that they cannot escape the penalty. The prisoner confessed after he was apprehended—yet at first denied the murder. When confronted with Mr. Van Arsdale, in a manner that would convince any sane man that he could not escape, he confessed the murder. He has made the same confession to me. If he had been affected with homicidal insanity we should expect to find him affected with furious madness. He has a low order of rational, uneducated mind. I cannot conceive of any case where a disease of mind or body is not manifested by some external symptoms. What he says, Van Nest said, "If you eat my liver,

I'll eat yours," is an expression of the ancients. If Van Nest spoke to him he might have heard that. Don't think prisoner has imagination enough to conceive it.

Cross-examined: As to who were the ancient people who were accustomed to eat the liver, think I noticed it in the history of Rome; it may be Livy, Mavor, or Goldsmith. I rather think he has heard the expression used but I don't think he ever read those works. His not complaining did not show that he did not feel pain. Any man can so control himself as

not to betray the pain he feels. I do not infer from this that he is a brute, for brutes manifest pain.

Visited the large hospital near Charing Cross; don't recollect the superintendent's name; don't recollect the number of patients. In Paris I visited a large number of hospitals; stayed there four months. Cannot name any of them. Which side of the Seine they were I cannot now tell. They were charity hospitals. Don't now recollect an instance of having seen a man deranged who was a laboring man.

THE SPEECHES TO THE JURY

MR. SEWARD FOR THE PRISONER

Mr. Seward. Gentlemen of the jury: "Thou shalt not kill" and Whoso sheddeth man's blood by man shall his blood be shed, are laws found in the code of that people, who, although dispersed and distracted, trace their history to the creation; a history which records that murder was the first of human crimes.

The first of these precepts constitutes a tenth part of the Jurisprudence which God saw fit to establish at an early period for the government of all mankind, throughout all generations. The latter of less universal obligation, is still retained in our system, although other states, as intelligent and refined, as secure and peaceful, have substituted for it the more benign principle that Good shall be returned for Evil. I yield implicit submission to this law, and acknowledge the justice of its penalty, and the duty of courts and juries to give it effect.

In this case, if the prisoner *be* guilty of murder, I do not ask remission of punishment. If he *be* guilty, never was murderer *more* guilty. He has murdered not only John G. Van Nest, but his hands are reeking with the blood of

other, and numerous, and even more pitiable victims. The slaying of Van Nest, if a crime at all, was the cowardly crime of assassination. John G. Van Nest was a just, upright, virtuous man, of middle age, of grave and modest demeanor, distinguished by especial marks of the respect and esteem of his fellow citizens. On his arm leaned a confiding wife, and they supported, on the one side, children to whom they had given being, and, on the other, aged and venerable parents, from whom they had derived existence. The assassination of such a man was an atrocious crime, but the murderer, with more than savage refinement, immolated on the same altar, in the same hour, a venerable and virtuous matron of more than three-score years, and her daughter, the wife of Van Nest, mother of an unborn infant. Nor was this all. Providence, which, for its own mysterious purposes, permitted these dreadful crimes, in mercy suffered the same arm to be raised against the sleeping orphan child of the butchered parents, and received it into Heaven. A whole family, just, gentle and pure, were thus, in their own house, in the night time, without any provocation, without one moment's warning, sent by the murderer to join the Assembly of the Just; and even the laboring man, sojourning within their gates, received the fatal blade into his breast, and survives through the mercy, not of the murderer, but of God.

For William Freeman, as a murderer, I have no commission to speak. If he had silver and gold accumulated with the frugality of Cræsus, and should pour it all at my feet, I would not stand an hour between him and the Avenger. But for the innocent, it is my right, my duty to speak. If this sea of blood was *innocently* shed, then it is my duty to stand beside him until his steps lose their hold upon the scaffold.

"Thou shalt not kill," is a commandment addressed not to him alone, but to me, to you, to the Court, and to the whole community. There are no exceptions from that commandment, at least in civil life, save those of self-defence,

and capital punishment for crimes, in the due and just administration of the law. There is not only a question, then, whether the prisoner has shed the blood of his fellow man, but the question, whether we shall unlawfully shed his blood. I should be guilty of murder if, in my present relation, I saw the executioner waiting for an insane man, and failed to say, or failed to do in his behalf, all that my ability allowed. I think it has been proved of the prisoner at the bar, that, during all this long and tedious trial, he has had no sleepless nights, and that even in the day time, when he retires from these halls to his lonely cell, he sinks to rest like a wearied child, on the stone floor, and quietly slumbers till roused by the constable with his staff, to appear again before the jury. His Counsel enjoy no such repose. Their thoughts by day and their dreams by night are filled with oppressive apprehensions that, through their inability or neglect, he may be condemned.

I am arraigned before you for undue manifestations of zeal and excitement. My answer to all such charges shall be brief. When this cause shall have been committed to you, I shall be happy, indeed, if it shall appear that my only error has been, that I have felt too much, thought too intensely, or acted too faithfully.

If *my* error would thus be criminal, how great would yours be if you should render an unjust verdict. Only four months have elapsed since an outraged people, distrustful of judicial redress, doomed the prisoner to immediate death. Some of you have confessed that you approved that lawless sentence. All men now rejoice that the prisoner was saved for this solemn trial. But this trial would be as criminal as that precipitate sentence, if through any wilful fault or prejudice of yours, it should prove but a mockery of justice. If any prejudice of witnesses, or the imagination of counsel, or any ill-timed jest shall at any time have diverted your attention, or if any prejudgment which you may have brought into the jury box, or any cowardly fear of popular opinion shall have operated to cause you to deny

to the prisoner that dispassionate consideration of his case which the laws of God and man exact of you, and if, owing to such an error, this wretched man fall from among the living, what will be your crime? You will have violated the commandment, "Thou shalt not kill." It is not the form or letter of the trial by jury that authorizes you to send your fellow man to his dread account, but it is the spirit that sanctifies that glorious institution; and if, through pride, passion, timidity, weakness, or any cause, you deny the prisoner one iota of all the defence to which he is entitled by the law of the land, you yourselves, whatever his guilt may be, will have broken the commandment, "Thou shalt do no murder."

There is not a corrupt or prejudiced witness—there is not a thoughtless or heedless witness, who has testified what was not true in spirit, or what was not wholly true, or who has suppressed any truth, who has not offended against the same injunction.

Nor is the Court itself above the commandment. If these Judges have been influenced by the excitement which has brought this vast assemblage here, and under such influence, or under any other influence, have committed voluntary error, and have denied to the prisoner or shall hereafter deny to him the benefit of any fact or any principle of law, then this Court will have to answer for the deep transgression, at that bar at which we all shall meet again. When we appear there, none of us can plead that we were insane and knew not what we did; and by just so much as our ability and knowledge exceed those of this wretch, whom the world regards as a fiend in human shape, will our guilt exceed his, if we be guilty.

I plead not for a murderer. I have no inducement, no motive to do so. I have addressed my fellow citizens in many various relations, when rewards of wealth and fame awaited me. I have been cheered on other occasions by manifestations of popular approbation and sympathy; and where there was no such encouragement, I had at least the

gratitude of him whose cause I defended. But I speak now in the hearing of a people who have prejudged the prisoner, and condemned me for pleading in his behalf. He is a convict, a pauper, a negro, without intellect, sense, or emotion. My child, with an affectionate smile, disarms my care-worn face of its frown whenever I cross my threshold. The beggar in the street obliges me to give, because he says "God bless you," as I pass. My dog caresses me with fondness if I will but smile on him. My horse recognizes me when I fill his manger. But what reward, what gratitude, what sympathy and affection can I expect here? There the prisoner sits. Look at him. Look at the assemblage around you. Listen to their ill-suppressed censures and their excited fears, and tell me where among my neighbors or my fellow men, where even in his heart, I can expect to find the sentiment, the thought, not to say of reward or of acknowledgment, but even of recognition. I sat here two weeks during the preliminary trial. I stood here between the prisoner and the jury nine hours, and pleaded for the wretch that he was insane and did not even know he was on trial: and when all was done, the jury thought, at least eleven of them thought, that I had been deceiving them, or was self-deceived. They read signs of intelligence in his idiotic smile, and of cunning and malice in his stolid insensibility. They rendered a verdict that he was sane enough to be tried—a contemptible compromise verdict in a capital case; and then they looked on, with what emotions God and they only know, upon his arraignment. The District Attorney, speaking in his adder ear, bade him rise, and reading to him one indictment, asked him whether he wanted a trial, and the poor fool answered, No. Have you counsel? No. And they went through the same mockery, the prisoner giving the same answers, until a third indictment was thundered in his ears, and he stood before the court, silent, motionless, and bewildered. Gentlemen, you may think of this evidence what you please, bring in what verdict you can, but I asseverate before Heaven and you, that, to the best of my

knowledge and belief, the prisoner at the bar does not at this moment know why it is that my shadow falls on you instead of his own.

I speak with all sincerity and earnestness; not because I expect my opinion to have weight, but I would disarm the injurious impression that I am speaking merely as a lawyer speaks for his client. I am not the prisoner's lawyer. I am indeed a volunteer in his behalf; but society and mankind have the deepest interests at stake. I am the lawyer for society, for mankind, shocked, beyond the power of expression, at the scene I have witnessed here of trying a maniac as a malefactor. In this, almost the first of such causes I have ever seen, the last I hope that I shall ever see, I wish that I could perform my duty with more effect. If I suffered myself to look at the volumes of testimony through which I have to pass, to remember my entire want of preparation, the pressure of time, and my wasted strength and energies, I should despair of acquitting myself as you and all good men will hereafter desire that I should have performed so sacred a duty. But in the cause of humanity we are encouraged to hope for Divine assistance where human powers are weak. As you all know, I provided for my way through these trials, neither gold nor silver in my purse, nor scrip; and when I could not think beforehand what I should say, I remembered that it was said to those who had a beneficent commission, that they should take no thought what they should say when brought before the magistrate, for in that same hour it should be given them what they should say, and it should not be they who should speak but the spirit of their Father speaking in them.

You have promised, gentlemen, to be impartial. You will find it more difficult than you have supposed. Our minds are liable to be swayed by temporary influences, and above all, by the influences of masses around us. At every stage of this trial, your attention has been diverted, as it will be hereafter, from the only question which it involves, by the eloquence of the Counsel for the People, reminding you of

the slaughter of that helpless and innocent family, and of the danger to which society is exposed by relaxing the rigor of the laws. Indignation against crime, and apprehensions of its recurrence, are elements on which public justice relies for the execution of the law. You must indulge that indignation. You cannot dismiss such apprehensions. You will in common with your fellow citizens deplore the destruction of so many precious lives, and sympathize with mourning relations and friends. Such sentiments cannot be censured when operating upon the community at large, but they are deeply to be deplored when they are manifested in the jury box.

Then, again, a portion of this issue has been tried, imperfectly tried, unjustly tried, already. A jury of twelve men, you are told, have already rendered their verdict that the prisoner is *now* sane. The deference which right minded men yield to the opinions of others, the timidity which weak men feel in dissenting from others, may tempt you to surrender your own independence. I warn you that that verdict is a reed which will pierce you through and through. That jury was selected without peremptory challenge. Many of the jurors entered the panel with settled opinions that the prisoner was not only guilty of the homicide, but sane, and all might have entertained such opinions for all that the prisoner could do. It was a verdict founded on such evidence as could be hastily collected in a community where it required moral courage to testify for the accused. Testimony was excluded upon frivolous and unjust pretences. The cause was submitted to the jury on the Fourth of July, and under circumstances calculated to convey a malicious and unjust spirit into the jury box. It was a strange celebration. The dawn of the Day of Independence was not greeted with cannon or bells. No lengthened procession was seen in our streets, nor were the voices of orators heard in our public halls. An intense excitement brought a vast multitude here, complaining of the delay and the expense of what was deemed an unnecessary trial, and demanding the

sacrifice of a victim, who had been spared too long already. For hours that assemblage was roused and excited by denunciations of the prisoner, and ridicule of his deafness, his ignorance, and his imbecility. Before the jury retired, the Court was informed that they were ready to render the verdict required. One juror, however, hesitated. The next day was the Sabbath. The jury were called and the Court remonstrated with the dissentient, and pressed the necessity of a verdict. That juror gave way at last, and the bell which summoned our citizens to church for the evening service, was the signal for the discharge of the jury, because they had agreed. Even thus a legal verdict could not be extorted. The eleven jurors, doubtless under an intimation from the Court, compromised with the twelfth, and a verdict was rendered, not in the language of the law, that the prisoner was "not insane," but that he was "sufficiently sane, in mind and memory, to distinguish between right and wrong;" a verdict which implied that the prisoner was at least *partially* insane, was diseased in other faculties beside the memory, and partially diseased in that, and that, although he had mind and memory to distinguish between right and wrong in the abstract, he had not reason and understanding and will to regulate his conduct according to that distinction; in short, a verdict by which the jury unworthily evaded the question submitted to them, and cast upon the Court a responsibility which it had no right to assume, but which it did nevertheless assume, in violation of the law. That twelfth juror was afterwards drawn as a juror in this cause, and was challenged by the Counsel for the People for partiality to the prisoner, and the challenge was sustained by the Court, because, although he had, as the court say, pronounced by his verdict that the prisoner was sane, he then declared that he believed the prisoner insane, and would die in the jury box before he would render a verdict that he was sane. Last and chief of all objections to that verdict now, it has been neither pleaded nor proved here, and therefore is not in evidence before you. I trust,

then, that you will dismiss to the contempt of mankind that jury and their verdict, thus equivocating upon Law and Science, Health and Disease, Crime and Innocence.

Again. An inferior standard of intelligence has been set up here as the standard of the negro race, and a false one as the standard of the Asiatic race. This prisoner traces a divided lineage. On the paternal side his ancestry is lost among the tiger hunters on the gold coast of Africa, while his mother constitutes a portion of the small remnant of the Narragansett tribe. Hence it is held that the prisoner's intellect is to be compared with the depreciating standard of the African, and his passions with the violent and ferocious character erroneously imputed to the Aborigines. Indications of manifest derangement, or at least of imbecility, approaching to idiocy, are, therefore, set aside, on the ground that they harmonize with the legitimate but degraded characteristics of the races from which he is descended. You, gentlemen, have, or ought to have, lifted up your souls above the bondage of prejudices so narrow and so mean as these. The color of the prisoner's skin, and the form of his features, are not impressed upon the spiritual, immortal mind which works beneath. In spite of human pride, he is still your brother, and mine, in form and color accepted and approved by his Father, and yours, and mine, and bears equally with us the proudest inheritance of our race—the image of our Maker. Hold him then to be a Man. Exact of him all the responsibilities which should be exacted under like circumstances if he belonged to the Anglo-Saxon race, and make for him all the allowances which, under like circumstances, you would expect for yourselves.

The prisoner was obliged—no, his counsel were obliged, by law, to accept the plea of *Not Guilty*, which the Court directed to be entered in his behalf. That plea denies the homicide. If the law had allowed it, we would gladly have admitted all the murders of which the prisoner was accused, and have admitted them to be as unprovoked as they were cruel, and have gone directly before you on the only defence

upon which we have insisted, or shall insist, or could insist—that he is irresponsible, because he was and is insane.

We labor not only under these difficulties, but under the further embarrassment that the plea of insanity is universally suspected. It is the last subterfuge of the guilty, and so is too often abused. But however obnoxious to suspicion this defence is, there have been cases where it was true; and when true, it is of all pleas the most perfect and complete defence that can be offered in any human tribunal. Our Savior forgave his Judges because “they knew not what they did.” The insane man who has committed a crime, knew not what he did. If this being, dyed with human blood, be *insane*, you and I, and even the children of our affections, are not more guiltless than he.

Is there reason to indulge a suspicion of fraud here? Look at this stupid, senseless fool, almost as inanimate as the clay moulded in the brick-yard, and say, if you dare, that you are afraid of being deceived by him. Look at me. You all know me. Am I a man to engage in a conspiracy to deceive you, and defraud justice? Look on us all, for although I began the defence of this cause alone, thanks to the generosity, to the magnanimity of an enlightened profession, I come out strong in the assistance of counsel never before attached to me in any relation, but strongly grappled to me now, by these new and endearing ties. Is any one of us a man to be suspected? The testimony is closed. Look through it all. Can suspicion or malice find in it any ground to accuse us of a plot to set up a false and fabricated defence? I will give you, gentlemen, a key to every case where insanity has been wrongfully, and yet successfully maintained. Gold, influence, popular favor, popular sympathy, raise that defence, and make it impregnable. But you have never seen a poor, worthless, spiritless, degraded negro like *this*, acquitted wrongfully. I wish this trial may prove that such an one can be acquitted rightfully. The danger lies here. There is not a white man or white woman who would not have been dismissed long since from

the perils of such a prosecution, if it had only been proved that the offender was so ignorant and so brutalized as not to understand that the defence of insanity had been interposed.

If he feign, who has trained the idiot to perform this highest and most difficult of all intellectual achievements? Is it I? Shakespeare and Cervantes, only, of all mankind, have conceived and perfected a counterfeit of insanity. Is it I? Why is not the imposition exposed, to my discomfiture and the prisoner's ruin? Where was it done? Was it in public, here? Was it in secret, in the jail? His deafened ears could not hear me there, unless I were overheard by other prisoners, by jailers, constables, the sheriff, and a cloud of witnesses. Who has the keys to the jail? Have I? You have had sheriff, jailer, and the whole police upon the stand. Could none of these witnesses reveal our plot? Were there none to watch and report the abuse? When they tell you, or insinuate, gentlemen, that this man has been taught to feign insanity, they discredit themselves, as did the Roman sentinels, who, appointed to guard the sepulchre of our Savior, said, in excuse of the broken seal, that while they slept men came and rolled away the stone.

I advance towards the merits of the cause. The law which it involves will be found in the case of Kleim, tried for murder in 1844, before Judge Edmonds in the city of New York, (*Journal of Insanity*, January, 1846, p. 261.)

"He told the jury that there was no doubt that Kleim had been guilty of the killing imputed to him, and that under circumstances of atrocity and deliberation which were calculated to excite in their minds strong feelings of indignation against him. But they must beware how they permitted such feelings to influence their judgment. They must bear in mind that the object of punishment was not vengeance, but reformation; not to extort from a man an atonement for the life which he cannot give, but by the terror of the example, to deter others from the like offences, and that nothing was so likely to destroy the public confidence in the administration of criminal justice, as the infliction of its pains upon one whom Heaven has already afflicted with the awful malady of Insanity."

These words deserve to be written in letters of gold upon tablets of marble. Their reason and philosophy are apparent. If you send the lunatic to the gallows, society will be shocked by your inhumanity, and the advocates for the abolition of capital punishment will find their most effective argument in the fact that a jury of the country, through ignorance, or passion, or prejudice, have mistaken a mad-man for a criminal.

The report of Judge Edmonds' charge proceeds:

"It was true that the plea of insanity was sometimes adopted as a cloak for crime, yet it was unfortunately equally true, that many more persons were unjustly convicted, to whom their unquestioned insanity ought to have been an unfailing protection."

This judicial answer to the argument that jurors are too likely to be swayed by the plea of insanity, is perfect and complete.

Judge Edmonds further charged the jury:

"That it was by no means an easy matter to discover or define the line of demarcation where sanity ended and insanity began, and it was often difficult for those most expert in the disease to detect or explain its beginning, extent, or duration; that the classifications of the disease were in a great measure arbitrary, and the jury were not obliged to bring the case of the prisoner within any one of the classes, because the symptoms of the different kinds were continually mingling with each other."

The application of this rule will render the present case perfectly clear, because it appears from the evidence that the prisoner is laboring under a combination of *mania* or excited madness, with *dementia* or decay of the mind.

Judge Edmonds furnishes you with a balance to weigh the testimony in the case, in these words:

"It was important that the jury should understand how much weight was to be given to the opinions of medical witnesses. The opinions of men who had devoted themselves to the study of insanity as a distinct department of medical science, and studied recent improvements and discoveries, especially when to that knowledge they added the experience of personal care of the insane, could never be safely disregarded by courts and juries; and on the other hand, the opinions of physicians who had not devoted

their particular attention to the disease, were not of any more value than the opinions of common persons."

This charge of Judge Edmonds furnishes a lamp to guide your feet, and throws a blazing light on your path. He acknowledges, in the first place, with distinguished independence for a Judge and a lawyer, that "the law, in its slow and cautious progress, still lags far behind the advance of true knowledge."

"An insane person is one who, at the time of committing the act, labored under such a defect of reason as not to know the nature and quality of the act he was doing, or if he did know it, did not know he was doing what was wrong; and the question is not whether the accused knew the difference between right and wrong *generally*, but whether he knew the difference between right and wrong in regard to the very act with which he is charged." "If some controlling disease was, in truth, the acting power within him, which he could not resist, or if he had not a sufficient use of his reason to control the passions which prompted him, he is not responsible. But it must be an absolute dispossession of the free and natural agency of the mind. In the glowing but just language of Erskine, it is not necessary that Reason should be hurled from her seat; it is enough that Distraction sits down beside her, holds her trembling in her place, and frightens her from her propriety." "And it must be borne in mind that the *moral* as well as *intellectual* faculties may be so disordered by the disease as to deprive the mind of its controlling and directing power.

In order then to establish a crime, a man must have memory and intelligence to know that the act he is about to commit is wrong; to remember and understand, that if he commit the act, he will be subject to punishment; and reason and will to enable him to compare and choose between the supposed advantage or gratification to be obtained by the criminal act, and the immunity from punishment which he will secure by abstaining from it.

If, on the other hand, he have not intelligence enough to have a criminal intent and purpose; and if his moral or intellectual powers are either so deficient that he has not sufficient will, conscience, or controlling mental power; or if through the overwhelming violence of mental disease his intellectual power is for the time obliterated, he is not a responsible moral agent."

The learned Judge recommended to the jury:

"As aids to a just conclusion, to consider the extraordinary and unaccountable alteration in the prisoner's whole mode of life; the inadequacy between the slightness of the cause and the magnitude of the offence; the recluse and ascetic life which he had led; his

invincible repugnance to all intercourse with his fellow creatures; his behavior and conduct at the time the act was done, and subsequently during his confinement; and the stolid indifference which he alone had manifested during the whole progress of a trial upon which his life or death depended."

Kleim was acquitted and sent, according to law, to the State Lunatic Asylum at Utica. The superintendent of the Asylum, in a note to this report, states that Kleim is uniformly mild and pleasant; has not asked a question, or spoken or learned the name of anyone; seems very imperfectly to recollect the murder or the trial; says he was put in prison; does not know what for; and was taken to the Court, but had no trial; that his bodily health is good; and that his mind is nearly gone—quite demented.

You cannot fail, gentlemen of the jury, to remark the extraordinary similarity between the case of Kleim, as indicated in the charge of Judge Edmonds, and that of the prisoner at the bar. If I were sure you would receive such a charge, and be guided by it, I might rest here, and defy the eloquence of the Attorney-General. The proof of insanity in this case is of the same nature, and the disease in the same form as in the case of Kleim. The only difference is, that the evidence here is a thousand times more conclusive. But Judge Edmonds does not preside here. Kleim was a white man, Freeman is a negro. Kleim set fire to a house, to burn only a poor, obscure woman and her child. Here the madman destroyed a whole family, rich, powerful, honored, respected and beloved. Kleim was tried in the city of New York; and the community engaged in their multiplied avocations, and heedless of a crime not infrequent there, and occurring in humble life, did not overawe and intimidate the Court, the jury, or the witnesses. Here a panic has paralyzed humanity. No man or woman feels safe until the maniac shall be extirpated from the face of the earth. Kleim had the sympathies of men and women, willing witnesses, advocates sustained and encouraged by popular favor, and an impartial jury. Freeman is already condemned by the tribunal of public opinion, and has re-

luctant and timorous witnesses, counsel laboring under embarrassments plainly to be seen, and a jury whose impartiality is yet to be proved.

The might that slumbered in this maniac's arm was exhausted in the paroxysm which impelled him to his dreadful deeds. Yet an excited community, whose terror has not yet culminated, declare, that whether sane or insane, he must be executed, to give safety to your dwellings and theirs. I must needs then tell you the law, which will disarm such cowardly fear. If you acquit the prisoner, he cannot go at large, but must be committed to jail, to be tried by another jury, for a second murder. Your dwellings therefore will be safe. If such a jury find him sane, he will then be sent to his fearful account, and your dwellings will be safe. If acquitted, he will be remanded to jail, to await a third trial, and your dwellings will be safe. If that jury convict, he will then be executed, and your dwellings will be safe. If they acquit, he will still be detained, to answer a fourth murder, and your dwellings will be safe. Whether the fourth jury acquit or convict, your dwellings will be safe; for if they convict, he will then be cut off, and if they acquit, he must, according to the law of the land, be sent to the Lunatic Asylum, there to be confined for life. You may not slay him then, for the public security, because the public security does not demand the sacrifice. No security for home or hearth can be obtained by Judicial Murder. God will abandon him, who, through cowardly fear, becomes such a murderer. *I* also stand for the security of the homes and hearths of my fellow citizens, and have as deep an interest, and as deep a stake as any one of them. *There* are my home and hearth, exposed to every danger that can threaten theirs; but I know that security cannot exist for any, if feeble man undertakes to correct the decrees of Providence.

The counsel for the People admit in the abstract that insanity excuses crime, but they insist on rules for the regulation of insanity, to which that disease can never conform it-

self. Dr. Fosgate testified that the prisoner was insane. He was asked by the Attorney-General, "What if the law, nevertheless, hold to be criminal that same state of mind which you pronounce insanity?" He answered with high intelligence and great moral firmness, "The law cannot alter the constitution of man as it was given him by his Maker."

Insanity, such as the counsel for the People would tolerate, never did and never will exist. They bring its definition from Coke, Blackstone and Hale, and it requires that by reason either of natural infirmity or of disease, the wretched subject shall be unable to count twenty, shall not know his father or mother, and shall have no more reason or thought than a brute beast.

According to the testimony of Dr. Spencer, and the claim of the Attorney-General, an individual is not insane if you find any traces or glimmerings of the several faculties of the human mind, or of the more important ones. Dr. Spencer has found in the prisoner, memory of his wrongs and sufferings, choice between bread and animal food, hunger to be appeased, thirst to be quenched, love of combat, imperfect knowledge of money, anger and malice. All of Dr. Spencer's questions to the accused show, that in looking for insanity, he demands an entire obliteration of all conception, attention, imagination, association, memory, understanding and reason, and everything else. There never was an idiot so low, never a diseased man so demented.

You might as well expect to find a man born without eyes, ears, nose, mouth, hands and feet, or deprived of them all by disease, and yet surviving, as to find such an idiot, or such a lunatic, as the counsel for the People would hold irresponsible. The reason is, that the human mind is not capable, while life remains, of such complete obliteration. What is the human mind? It is immaterial, spiritual, immortal; an emanation of the divine intelligence, and if the frame in which it dwells had preserved its just and natural proportions, and perfect adaptation, it would be a pure and heavenly existence. But that frame is marred and dis-

ordered in its best estate. The spirit has communication with the world without, and acquires imperfect knowledge only through the half-opened gates of the senses. If, from original defects, or from accidental causes, the structure be such as to cramp or restrain the mind, it becomes or appears to be weak, diseased, vicious and wicked. I know one who was born without sight, without hearing, and without speech, retaining the faculties of feeling and smell. That child was, and would have continued to be an idiot, incapable of receiving or communicating thoughts, feelings, or affections; but tenderness unexampled, and skill and assiduity unparalleled, have opened avenues to the benighted mind of Laura Bridgman, and developed it into a perfect and complete human spirit, consciously allied to all its kindred, and aspiring to Heaven. Such is the mind of every idiot, and of every lunatic, if you can only open the gates, and restore the avenues of the senses; and such is the human soul when deranged and disordered by disease, imprisoned, confounded, benighted. That disease is insanity.

Doth not the idiot eat? Doth not the idiot drink? Doth not the idiot know his father and his mother? He does all this because he is a man. Doth he not smile and weep? And think you he smiles and weeps for nothing? He smiles and weeps because he is moved by human joys and sorrows, and exercises his reason, however imperfectly. Hath not the idiot anger, rage, revenge? Take from him his food, and he will stamp his feet and throw his chains in your face. Think you he doth this for nothing? He does it all because he is a man, and because, however imperfectly, he exercises his reason. The lunatic does all this, and, if not quite demented, all things else that man, in the highest pride of intellect, does or can do. He only does them in a different way. You may pass laws for his government. Will he conform? Can he conform? What cares he for your laws? He will not even plead; he cannot plead his disease in excuse. You must interpose the plea for him, and if you allow it, he, when redeemed from his mental bondage, will

plead for you, when he returns to your Judge and his. If you deny his plea, he goes all the sooner, freed from imperfection, and with energies restored, into the presence of that Judge. You must meet him there, and then, no longer bewildered, stricken and dumb, he will have become as perfect, clear and bright, as those who reviled him in his degradation, and triumphed in his ruin.

And now what is insanity? Many learned men have defined it for us, but I prefer to convey my idea of it in the simplest manner. Insanity is a disease of the body, and I doubt not of the brain. The world is astonished to find it so. They thought for almost six thousand years, that it was an affection of the mind only. Is it strange that the discovery should have been made so late? You know that it is easier to move a burden upon two smooth rails on a level surface, than over the rugged ground. It has taken almost six thousand years to learn that. But moralists argue that insanity shall not be admitted as a physical disease, because it would tend to exempt the sufferer from responsibility, and because it would expose society to danger. But who shall know, better than the Almighty, the ways of human safety, and the bounds of human responsibility?

And is it strange that the brain should be diseased? What organ, member, bone, muscle, sinew, vessel or nerve is not subject to disease? What is physical man, but a frail, perishing body, that begins to decay as soon as it begins to exist? What is there of animal existence here on earth, exempt from disease and decay? Nothing. The world is full of disease, and that is the great agent of change, renovation and health.

And what wrong or error can there be in supposing that the mind may be so affected by disease of the body as to relieve man from responsibility? You will answer, it would not be safe. But who has assured you of safety? Is not the way of life through dangers lurking on every side, and though you escape ten thousand perils, must you not fall at last? Human life is not safe, or intended to be safe, against

the elements. Neither is it safe, or intended to be safe, against the moral elements of man's nature. It is not safe against pestilence, or against war, against the thunderbolt of Heaven, or against the blow of the maniac. But comparative safety can be secured, if you will be wise. You can guard against war, if you will cultivate peace. You can guard against the lightning if you will learn the laws of electricity, and raise the protecting rod. You will be safe against the maniac, if you will watch the causes of madness, and remove them. Yet after all there will be danger enough from all these causes, to remind you that on earth you are not immortal.

Although my definition would not perhaps be strictly accurate, I should pronounce insanity to be a derangement of the mind, character and conduct, resulting from bodily disease. I take this word derangement, because it is one in common every day use. We all understand what is meant when it is said that any thing is ranged or arranged. The houses on a street are ranged, if built upon a straight line. The fences on your farms are ranged. A tower, if justly built, is ranged; that is, it is ranged by the plummet. It rises in a perpendicular range from the earth. A file of men marching in a straight line are in range. "Range yourselves, men," though not exactly artistical, is not an uncommon word of command. Now what do we mean when we use the word "*deranged*"? Manifestly that a thing is not ranged, is not arranged, is out of range. If the houses on the street be built irregularly, they are deranged. If the fences be inclined to the right or left, they are deranged. If there be an unequal pressure on either side, the tower will lean, that is, it will be deranged. If the file of men become irregular the line is deranged. So if a man be insane. There was a regular line which he was pursuing; not the same line which you or I follow, for all men pursue different lines, and every sane man has his own peculiar path. All these paths are straight, and all are ranged, though all divergent. It is easy enough to discover when

the street, the fence, the tower, or the martial procession is deranged. But it is quite another thing to determine when the course of an individual life has become deranged. We deal not then with geometrical or material lines, but with an imaginary line. We have not physical objects for land-marks. We trace the line backward by the light of imperfect and unsatisfactory evidence, which leaves it a matter almost of speculation whether there has been a departure or not. In some cases, indeed, the task is easy. If the fond mother becomes the murderer of her offspring, it is easy to see that she is deranged. If the pious man, whose steps were firm and whose pathway led straight to Heaven, sinks without temptation into criminal debasement, it is easy to see that he is deranged. But in cases where no natural instinct or elevated principle throws its light upon our research, it is often the most difficult and delicate of all human investigations to determine when a person is deranged.

We have two tests. *First*, to compare the individual after the supposed derangement with himself as he was before. *Second*, to compare his course with those ordinary lines of human life which we expect sane persons, of equal intelligence, and similarly situated, to pursue.

If derangement, which is insanity, mean only what we have assumed, how absurd is it to be looking to detect whether memory, hope, joy, fear, hunger, thirst, reason, understanding, wit, and other faculties remain! So long as life lasts they never cease to abide with man, whether he pursue his straight and natural way, or the crooked and unnatural course of the lunatic. If he be diseased, his faculties will not cease to act. They will only act differently. It is contended here that the prisoner is not deranged because he performed his daily task in the State Prison, and his occasional labor afterwards; because he grinds his knives, fits his weapons, and handles the file, the axe, and the saw, as he was instructed, and as he was wont to do. Now the Lunatic Asylum at Utica has not an idle person in it, ex-

cept the victims of absolute and incurable dementia, the last and worst stage of all insanity. Lunatics are almost the busiest people in the world. They have their prototypes only in children. One lunatic will make a garden, another drive the plough, another gather flowers. One writes poetry, another essays, another orations. In short, lunatics eat, drink, sleep, work, fear, love, hate, laugh, weep, mourn, die. They do all things that sane men do, but do them in some peculiar way. It is said, however, that this prisoner has hatred and anger, that he has remembered his wrongs, and nursed and cherished revenge; wherefore, he cannot be insane. Cowper, a moralist who had tasted the bitter cup of insanity, reasoned otherwise:

"But violence can never longer sleep
Than Human Passions please. In ev'ry heart
Are sown the sparks that kindle fiery war;
Occasion needs but fan them and they blaze,
The seeds of murder in the breast of man."

Melancholy springs oftenest from recalling and brooding over wrong and suffering. Melancholy is the first stage of madness, and it is only recently that the less accurate name of monomania has been substituted in the place of melancholy. Melancholy is the foster-mother of anger and revenge. Until 1830 our statutory definition of lunatics was in the terms "*disorderly persons, who, if left at large, might endanger the lives of others.*" Our laws now regard them as *merely* disorderly and dangerous, and society acquiesces, unless madness rise so high that the madman slay his imaginary enemy, and then he is pronounced sane.

The prisoner lived with Nathaniel Lynch, at the age of eight or nine, and labored occasionally for him during the last winter. Lynch visited him in the jail, and asked him if he remembered him, and remembered living with him. The prisoner answered, yes. Lynch asked the prisoner whether he was whipped while there, and by whom, and why. From his answers it appeared that he had been whipped by his mistress for playing truant, and that he

climbed a rough board fence in his night clothes and fled to his mother. Upon this evidence, the learned Professor from Geneva College, Dr. Spencer, builds an argument that the prisoner has conception, sensation, memory, imagination, and association, and is most competent for the scaffold. Now here are some verses to which I would invite the Doctor's attention:

"Shut up in dreary gloom, like convicts are,
In company of murderers! Oh, wretched fate!
If pity e'er extended through the frame,
Or sympathy's sweet cordial touched the heart,
Pity the wretched maniac who knows no blame,
Absorbed in sorrow, where darkness, poverty, and
every curse impart."

Here is evidence not merely of memory and other faculties, but of what we call genius. Yet these verses are a sad effusion of Thomas Lloyd, a man-slaying maniac in Bedlam.

The first question of fact here, gentlemen, as in every case where insanity is gravely insisted upon, is this:

Is the Prisoner feigning or counterfeiting insanity?

What kind of man is he? A youth of twenty-three, without learning, education, or experience. Dr. Spencer raises him just above the brute; Dr. Bigelow exalts him no higher; and Dr. Dimon thinks that he has intellectual capacity not exceeding that of a child of ten years, with the knowledge of one of two or three. These are the People's witnesses. All the witnesses concur in these estimates of his mind.

Can you conceive of such a creature comprehending such a plot, and standing up in his cell in the jail, hour after hour, day after day, week after week, and month after month, carrying on such a fraud; and all the while pouring freely into the ears of inquisitors, curious, inquisitors friendly, and inquisitors hostile, without discrimination or alarm, or apparent hesitation or suspicion, with "child-like simplicity," as our witnesses describe it, and with "entire docility," as it is described by the witnesses for the People, confessions of crime, which, if they fail to be received as

evidences of insanity, must constitute an insurmountable barrier to his acquittal?

I am ashamed for men who, without evidence of the prisoner's dissimulation, and in opposition to the unanimous testimony of all the witnesses, that he is sincere, still think that this poor fool may deceive them. If he could feign, and were feigning, would he not want some counsel, some friend, if not to advise and assist, at least to inform him of the probable success of the fraud? And yet no one of his counsel or witnesses has ever conversed with him, but in a crowd of adverse witnesses; and for myself, I have not spoken with him in almost two months, and during the same period have never looked upon him elsewhere than here, in the presence of the Court and the multitude.

Would a sane man hold nothing back, admit everything to everybody, affect no ignorance, no forgetfulness, no bewilderment, no confusion, no excitement, no delirium?

Dr. Ray, in his Treatise on the Medical Jurisprudence of Insanity, (p. 333,) gives us very different ideas from all this, of those who can feign, and of the manner of counterfeiting:

"A person who has not made the insane a subject of study, cannot simulate madness, so as to deceive a physician well acquainted with the disease. *Mr. Haslam* declares, that 'to sustain the character of a paroxysm of active insanity, would require a continuity of exertion beyond the power of a sane person.' *Dr. Conolly* affirms that he can hardly imagine a case which would be proof against an efficient system of observation.

"The grand fault committed by impostors is, that they *overdo* the character they assume.

"The really mad, except in the acute stage of the disease, are, generally speaking, not readily recognized as such by a stranger, and they retain so much of the rational as to require an effort to detect the impairment of their faculties.

"Generally speaking, after the acute stage has passed off, a maniac has no difficulty in remembering his friends and acquaintances, the places he has been accustomed to frequent, names, dates, and events, and the occurrences of his life. The ordinary relations of things are, with some exceptions, as easily and clearly perceived as ever, and his discrimination of character seems to be marked by his usual shrewdness. * * * A person simulating

mania will frequently deny all knowledge of men and things with whom he has always been familiar."

And now, gentlemen, I will give you a proof of the difference between this real science and the empiricism upon which the counsel for the People rely, in this cause. Jean Pierre was brought before the Court of Assizes in Paris, in 1824, accused of forgery, swindling, and incendiarism. He feigned insanity. A commission of eminent physicians examined him, and detected his imposture by his pretended forgetfulness, and confusion in answering interrogatories concerning his life and history.

Again, gentlemen, look at the various catechisms in which this prisoner has been exercised for two months, as a test of his sanity. Would any sane man have propounded a solitary one of all those questions to any person whom he believed to be of sound mind? Take an instance. On one occasion, Dr. Willard, a witness for the People, having exhausted the idiot's store of knowledge and emotion, expressed a wish to discover whether the passion of fear had burned out, and employing Mr. Morgan's voice, addressed the prisoner thus: "Bill, they're going to take you out to kill you. They're going to take you out to kill you, Bill." The poor creature answered nothing. "What do you think of it, Bill?" Answer: "I don't think about it—I don't believe it." "Bill," continues the inquisitor, with louder and more terrific vociferation, "they're going to kill you, and the doctors want your bones; what do you think of it, Bill?" The prisoner answers: "I don't think about it—I don't believe it." The doctor's case was almost complete, but he thought that perhaps the prisoner's stupidity might arise from inability to understand the question. Therefore, lifting his voice still higher, he continues: "Did you ever see the doctors have any bones? Did you ever see the doctors have any bones, Bill?" The fool answers, "I have." "Then where did you see them, Bill?" "In Dr. Pitney's office." And thus, by this dialogue, the sanity of the accused is, in the judgment of Dr. Willard, completely estab-

lished. It is no matter that if the prisoner had believed the threat, his *belief* would have proved him sane; if he had been terrified, his *fears* would have sent him to the gallows; if he had forgotten the fleshless skeleton he had seen, he would have been convicted of *falsehood*, and of course have been sane. Of such staple as this are all the questions which have been put to the prisoner by all the witnesses. There is not an interrogatory which any one of you would have put to a child twelve years old.

Does the prisoner feign insanity?

One hundred and eight witnesses have been examined, of whom seventy-two appeared on behalf of the People. No one of them has expressed a belief that he was simulating. On the contrary, every witness to whom the inquiry has been addressed, answers that the sincerity of the prisoner is beyond question.

Mr. Seward here reviewed the testimony of the witnesses to establish the proposition that the prisoner could not feign, and never attempted to simulate insanity.¹²

I submit to you, gentlemen of the jury, that by comparing the prisoner with himself, as he was in his earlier, and as he is in his later history, I have proved to you conclusively that he is visibly changed and altered in mind, manner, conversation and action, and that all his faculties have become disturbed, impaired, degraded and debased. I submit also, that it is proved, *First*, that this change occurred between the sixteenth and the eighteenth years of his life, in the State Prison, and that therefore the change, thus palpable, was not, as the Attorney-General contends, effected by mere lapse of time and increase of years, nor by the nat-

¹² These were John R. Hopkins, Ethan A. Warden, Dr. Hermance, Rev. John M. Austin, Dr. Bigelow, Dr. Spencer, Nathaniel Hersey, John DePuy, David Winner, Nathaniel Lynch, Daniel Andrus, Mary Ann Newark, Adam Gray, Dr. Briggs, Robert Freeman, Dr. Van Epps, Thomas F. Munroe, A. A. Vanderheyden, A. A. Sabin, Jeff. Wellington, Lewis Markham, Sally Freeman, Deborah Depuy, William P. Smith, Theron Green, Horace Hotchkiss, Alonzo Wood, Dr. Dimon and Dr. Bigelow.

ural development of latent dispositions; *Secondly*, that inasmuch as the convicts in the State Prison are absolutely abstemious from intoxicating drinks, the change was not, as the Attorney-General supposes, produced by intemperance.

I have thus arrived at the *third* proposition in this case, which is, that:

The prisoner at the bar is insane.

This I shall demonstrate, *First*, by the fact already so fully established, that the prisoner is changed; *Secondly*, by referring to the predisposing causes which might be expected to produce insanity; *Thirdly*, by the incoherence and extravagance of the prisoner's conduct and conversation, and the delusions under which he has labored.

And now as to predisposing causes. The prisoner was born in this village, twenty-three years ago, of parents recently emerged from slavery. His mother was a woman of violent passions, severe discipline, and addicted to intemperance. His father died of *delirium tremens*, leaving his children to the neglect of the world, from which he had learned nothing but its vices.

Hereditary insanity was added to the prisoner's misfortunes, already sufficiently complicated. His aunt, Jane Brown, died a lunatic. His uncle, Sidney Freeman, is an acknowledged lunatic.

All writers agree, what it needs not writers to teach, that *neglect of education* is a fruitful cause of crime. If neglect of education produces crime, it equally produces insanity. Here was a bright, cheerful, happy child, destined to become a member of the social state, entitled by the principles of our Government to equal advantages for perfecting himself in intelligence, and even in political rights, with each of the three millions of our citizens, and blessed by our religion with equal hopes. Without his being taught to read, his mother, who lives by menial service, sends him forth at the age of eight or nine years to like employment. Reproaches are cast on his mother, on Mr. Warden, and on Mr. Lynch, for not sending him to school, but these re-

proaches are all unjust. How could she, poor degraded negress and Indian as she was, send her child to school? And where was the school to which Warden and Lynch should have sent him? There was no school for him. His few and wretched years date back to the beginning of my acquaintance here, and during all that time, with unimportant exceptions, there has been no school here for children of his caste. A school for colored children was never established here, and all the common schools were closed against them. Money would always produce instruction for my children, and relieve me from the responsibility. But the colored children, who have from time to time been confided to my charge, have been cast upon my own care for education. When I sent them to school with my own children, they were sent back to me with a message that they must be withdrawn, because they were black, or the school would cease. Here are the fruits of this unmanly and criminal prejudice. A whole family is cut off in the midst of usefulness and honors by the hand of an assassin. You may avenge the crime, but whether the prisoner be insane or criminal, there is a tribunal where this neglect will plead powerfully in his excuse, and trumpet-tongued against the "deep damnation" of his "taking off."

Again. The prisoner was subjected, in tender years, to severe and undeserved *oppression*. Whipped at Lynch's; severely and unlawfully beaten by Wellington, for the venial offence of forgetting to return a borrowed umbrella; hunted by the police on charges of petty offences, of which he was proved innocent; finally, convicted, upon constructive and probably perjured evidence, of a crime, of which it is now universally admitted he was guiltless, he was plunged into the State Prison at the age of sixteen, instead of being committed to a House of Refuge.

Mere *imprisonment* is often a cause of insanity. Four insane persons have, on this trial, been mentioned as residing among us, all of whom became insane in the State Prison. Authentic statistics show that there are never less than

thirty insane persons in each of our two great penitentiaries. In the State Prison the prisoner was subjected to severe corporal punishment, by keepers who mistook a decay of mind and morbid melancholy, for idleness, obstinacy and malice. Beaten, as he was, until the organs of his hearing ceased to perform their functions, who shall say that other and more important organs connected with the action of his mind, did not become diseased through sympathy? Such a life, so filled with neglect, injustice and severity, with anxiety, pain, disappointment, solicitude and grief, would have its fitting conclusion in a mad-house. If it be true, as the wisest of inspired writers hath said, "Verily oppression maketh a wise man mad," what may we not expect it to do with a foolish, ignorant, illiterate man! Thus it is explained why, when he came out of prison, he was so dull, stupid, morose; excited to anger by petty troubles, small in our view, but mountains in his way; filled in his waking hours with moody recollections, and rising at midnight to sing incoherent songs, dance without music, read unintelligible jargon, and combat with imaginary enemies.

How otherwise than on the score of madness can you explain the stupidity which caused him to be taken for a fool at Applegate's, on his way from the prison to his home? How else, the ignorance which made him incapable of distinguishing the coin which he offered at the hatter's shop? How else, his ludicrous apprehensions of being re-committed to the State Prison for five years, for the offence of breaking his dinner knife? How else, his odd and strange manner of accounting for his deafness, by expressions, all absurd and senseless, and varying with each interrogator: as to John De Puy, "that Tyler struck him across the ears with a plank, and knocked his hearing off, and that it never came back; that they put salt in his ear, but it didn't do any good, for his hearing was gone—all knocked off;" to the Rev. John M. Austin, "the stones dropped down my ears, or the stones of my ears dropped down;" to Ethan A. Warden, "got stone in my ear; got it out; thought I heard

better when I got it out;" to Dr. Hermance, "that his ears dropped;" and to the same witness on another occasion, "that the hearing of his ears fell down;" to his mother, "that his ear had fell down;" to Deborah De Puy, "that Tyler struck him on the head with a board, and it seemed as if the sound went down his throat."

It is now perfectly certain, from the testimony of Mr. Van Arsdale and Helen Holmes, that the prisoner first stabbed Mrs. Van Nest, in the back yard, and then entered the house and stabbed Mr. Van Nest, who fell lifeless at the instant of the blow. And yet, sincerely trying to give an account of the dreadful scenes, exactly as they passed, the prisoner has invariably stated, in his answers to every witness, that he entered the house, stabbed Van Nest, went to the yard, and then, and not before, killed Mrs. Van Nest. It was in this order that he related the transaction to Warren T. Worden, to John M. Austin, to Ira Curtis, to Ethan A. Warden, to William P. Smith, to Dr. Van Epps, to James H. Bostwick, to Dr. Brigham, to Nathaniel Lynch, to Dr. Willard, to Dr. Bigelow, and to Dr. Spencer. How else than on the score of madness can you explain this confusion of memory? And if the prisoner was sane, and telling a falsehood, what was the motive?

How else than on the score of a demented mind will you explain the fact, that he is without human curiosity; that he has never, since he came out of prison, learned a fact, or asked a question? He has been visited by hundreds in his cell, by faces become familiar, and by strangers, by fellow prisoners, by jailers, by sheriff, by counsel, by physician, by friends, by enemies, and by relations, and they unanimously bear witness that he has never asked a question. The oyster, shut up within its limestone walls, is as inquisitive as he.

How else will you explain the mystery that he, who seven years ago had the capacity to relate connectively any narrative, however extended, and however complex in its details, is now unable to continue any relation of the most recent

events, without the prompting of perpetual interrogatories, always leading him by known land-marks; and that when under such discipline he answers, he employs generally the easiest forms, "Yes," "No," "Don't know."

Then mark the confusion of his memory, manifested by contradictory replies to the same question. Warren T. Worden asked him: "Did you go in at the front door? Yes. Did you go in at the back door? Yes. Were you in the hall when your hand was cut? Yes. Was your hand cut at the gate? Yes. Did you stab Mrs. Wyckoff in the hall? Yes. Did you stab Mrs. Wyckoff at the gate? Yes. Did you go out at the back door? Yes. Did you go out at the front door? Yes."

Ethan A. Warden asked him, "What made you kill the child?" "Don't know any thing about that." At another time he answered, "I don't think about it; I didn't know it was a child." And again, on another occasion, "Thought—feel it more;" and to Dr. Bigelow, and other witnesses, who put the question, whether he was not sorry he killed the child, he replied, "It did look *hard*—I rather it was bigger." When the ignorance, simplicity and sincerity of the prisoner are admitted, how otherwise than on the ground of insanity, can you explain such inconsistencies as these?

The testimony of Van Arsdale and Helen Holmes, proves that no words could have passed between the prisoner and Van Nest, except these, "What do you want in the house?" spoken by Van Nest, before the fatal blow was struck. Yet when inquired of by Warren T. Worden what Van Nest said to him when he entered the house, the prisoner said, after being pressed for an answer, that Van Nest said to him, "If you eat my liver, I'll eat yours:" and he at various times repeated to the witness the same absurd expression. To the Rev. John M. Austin he made the same statement, that Van Nest said, "If you eat my liver, I'll eat your liver;" to Ira Curtis the same; to Ethan A. Warden the same; to Lansing Briggs the same; and the same to almost every other witness. An expression so absurd under the

circumstances, could never have been made by the victim. How otherwise can it be explained than as the vagary of a mind shattered and crazed?

The prosecution, confounded with this evidence, appealed to Dr. Spencer for relief. He, in the plenitude of his learning, says, that he has read of an ancient and barbarous people, who used to feast upon the livers of their enemies, that the prisoner has not imagination enough to have invented such an idea, and that he must somewhere have heard the tradition. But when did this demented wretch, who reads "woman" for "admirable," and "cook" for "Thompson," read Livy or Tytler, and in what classical circle has he learned the customs of the ancients? Or, what perhaps is more pertinent, who were that ancient and barbarous people, and who was their historian?

Consider now the prisoner's earnest and well-attested sincerity in believing that he could read, when either he never had acquired, or else had lost, the power of reading. The Rev. Mr. Austin visited him in jail, at an early day, asked him whether he could read, and being answered that he could gave him a Testament. In frequent visits afterwards when the prisoner was asked whether he had read his Testament, he answered, "Yes," and it was not until after the lapse of two months that it was discovered that he was unable to spell a monosyllable.

Ira Curtis says: "I asked him if he could read; he said, 'Yes,' and commenced reading, that is he pretended to, but he didn't read what was there. He read, '*Oh! Lord—mercy—Moses*'—and other words mixed up in that way. The words were not in the place where he seemed to be reading, and it was no reading at all, and some words he read over I had never heard before. I took the book from him, saying, 'You don't read right.' He said, 'Yes, I do.' I said, 'William, you can't read.' He said, 'I can.' I gave him a paper, pointed him to the word, 'admirable'—he pronounced it 'woman.' I pointed to the word 'Thompson'—he read it 'cook.' He knew his letters, and called them ac-

curately, but could not combine them. I asked him to count. He commenced and counted from one up to twenty, hesitated there some time, and finally counted up to twenty-eight, and then jumped to eighty. Then I started him at twenty, and he said 'one.' I told him to say 'twenty-one,' but he seemed to have difficulty in saying 'twenty-one.' He tried to go on. He did count up to twenty regularly, by hesitating; but never went higher than twenty-eight correctly. I asked him how much two times four was,—he said 'eighty.' How much two times three was—he said 'sixty or sixty-four.'” Many other witnesses on both sides of this cause, Mr. Austin, Mr. Hopkins, Mr. Hotchkiss, Mr. Worden, Mr. Smith, Dr. Van Epps, Dr. Brigham, Dr. McCall, Dr. Coventry, Dr. Willard, Dr. Bigelow, Dr. Clary and Dr. Spencer, have with varied ingenuity, sought to detect a fraud in this extreme ignorance and simplicity, and have unanimously testified to you that the simpleton sincerely believes he reads accurately, and as honestly thinks he counts above twenty-eight correctly, while in truth he cannot advance beyond that number in counting, and cannot read at all. Yet he must, at least, have learned in the Sunday School that he could not read, and the keepers of the prison show that he put up his daily manufacture of rings and skeins of thread, in quantities accurately counted, to the number of several dozen.

I think you will agree with Doctor Hun, that there is not a sane man twenty-three years of age, brought up in this country, who does not know whether he can read, and who cannot count twenty-nine.

Mark his indifference and stupidity as to his situation. Ethan A. Warden asked him, “Do you expect to be hung? ‘Don’t think about it.’ Do you like to be in jail? ‘Pretty well.’ Is it a good place? ‘Yes.’ Do you sleep well? ‘Yes.’ Do you think of what you’ve done? ‘No.’”

William P. Smith asked him in the jail if he knew whether he was in jail or in the prison. He hesitated some time, and finally thought he was in the jail, but wasn’t

sure. "Do you know what you are confined here for?" "No."

Dr. Brigham says, "I tried in various ways to ascertain if he knew what he was to be tried for. Never could get a distinct answer. Asked him at one time, what his defence would be. Shall we say that you did not kill? He answered very quickly, looking up, 'No.' But may we not say so? 'No, that would be wrong; I did do it.' Some one asked him when others were there, May we say you are crazy? 'I can't go so far as that.'"

When on trial for stealing a horse, six years ago, he had counsel of his own choice, and was treated and tried as a man who understood and knew his rights, as indeed it is proved that he did. Here his life is at stake. He does not know even the name of a witness for or against him, although his memory recalls the names of those who testified against him on his trial for stealing the horse, and the very effect of their testimony.

On the very day when he was to be arraigned, he had no counsel; and, as Mr. Austin testifies, was made to understand, with difficulty, enough to repeat like a parrot a consent that I should defend him. The Attorney-General says, the prisoner "knew he was guilty, and that counsel could do nothing for him. If he was as wise and as intelligent as Bacon himself, he could give no instructions to counsel that would help him." Aye, but is he as wise and as intelligent as Bacon? No, gentlemen, no man ever heard of a sane murderer in whose bosom the love of life and the fear of death were alike extinguished.

The accused sat here in Court, and saw Dr. Bigelow on the stand swearing away his life, upon confessions already taken. Dr. Bigelow, followed him from the Court to his cell, and there the prisoner, with childlike meekness, sat down on his bench and confessed further for hours, all the while holding the lamp by whose light Dr. Bigelow recorded the testimony, obtained for the purpose of sealing his fate beyond a possible deliverance.

He was asked about the Judges here, was ignorant where they sat, and could only remember that there was a good looking man on the elevated stage, which he was told was the bench. He was asked what they say in Court, and he says, "They talk, but I hear nothing;" what or whom they are talking about, and he says, "Don't know;" whom he has seen here, and he recalls not his Judges, the jury, the witnesses or the counsel, but only the man who gave him tobacco.

From his answer to Mr. Hopkins, Mr. Austin, Mr. Smith, and others, as well as from the more reliable testimony of his mother, of his brother-in-law, of Mr. Lynch, Mr. Warden, Mr. Hotchkiss, and others, we learn that in his childhood, and in State Prison, he attended Sunday School and Divine Worship. Yet we find him at the age of twenty-three, after repeated religious instructions, having no other idea of a Supreme Being and of a future state, than that Heaven was a place above, and God was above, but that God was no more than a man or an animal. And when asked by Mr. Hopkins what he knew about Jesus Christ, he answered that he came to Sunday School in the State Prison. What did he do there? "Don't know." Did he take a class there? "Don't know." Did he preach? "Don't know." Did he talk? "Don't know." The prisoner gave the same answers to the Rev. Mr. Austin, to Mr. Hotchkiss, his Sunday School teacher, and to Dr. Brigham.

Mr. Horace Hotchkiss says: "I asked him in jail, if you shall be convicted and executed, what will become of you? He answered, 'Go to Heaven.' I asked him why, and he replied, 'Because I am good.'" Dr. Brigham inquired: "Do you know any thing of Jesus Christ?" "I saw him once." "Did you kill him at Van Nest's?" The poor fool (as if laboring with some confused and inexplicable idea) said, "Don't know." I think, gentlemen, that you will agree with Dr. Hun, Dr. Brigham, and the other intelligent witnesses, who say that, in their opinion, there is no sane man of the age of twenty-three, who has been brought up in

church-going families, and been sent to Sunday School, whose religious sentiments would, under such circumstances, be so confused and so absurd as these.

To the Rev. Mr. Austin, he said after his arrest, "*if they will let me go this time, I will try and do better.*" And well did that witness remark, that such a statement evinced a want of all rational appreciation of the nature and enormity of his acts, for no man twenty-three years old, possessing a sound mind, and guilty of four-fold murders, could suppose that he would be allowed to escape all punishment by simply promising, like a petulant child, that he would "do better."

Mark his insensibility to corporal pain and suffering. In the conflict with Mrs. Wykoff, he received a blow which divided a sinew in his wrist, and penetrated to the bone. The physicians found him in the jail with his wound, his legs chained, and heavy irons depending unequally from his knees. Yet he manifested absolute insensibility. Insane men are generally very insensible to pain. The reason is, that the nervous system is diseased, and the senses do not convey to the mind accurate ideas of injuries sustained. Nevertheless, this passes for nothing with Dr. Spencer, because there was an ancient sect of philosophers who triumphed, or affected to triumph, over the weakness of our common nature, and because there are modern heroes who die without a groan on the field of battle. But in what school of philosophy, or in what army, or in what battleship was the idiot trained, that he has become insensible to pain, and reckless of death?

I proposed, gentlemen, at the close of the testimony, that you should examine the prisoner for yourselves. I regret that the offer was rejected. You can obtain only very imperfect knowledge from testimony in which the answers of the prisoner are given with the freedom and volubility of the interrogators. We often judge more justly from the tone, manner and spirit of those with whom we converse, than from the language they use. All the witnesses agree

that the prisoner's tone and modulation are slow, indistinct, and monotonous. His utterance, in fact, is that of an idiot, but on paper it is as distinct as that of Cicero.

I have thus shown you, gentlemen, the difficulties which attended you in this investigation, the law concerning insanity, the nature and characteristics of that disease, the great change which the prisoner has undergone, and some of those marked extravagances which denote lunacy. More conclusive evidence yet remains; and *first*, the delusion by which the prisoner was overpowered, and under whose fearful spell his crimes were committed.

Delusion does not always attend insanity, but when found, it is the most unequivocal of all proofs. I have already observed that melancholy is the first stage of madness, and long furnished the name for insanity. In the case of Hatfield, who fired at the King in Drury-Lane Theatre, Lord Erskine, his counsel, demonstrated that insanity did not consist in the absence of any of the intellectual faculties, but in delusion; and that an offender was irresponsible, if his criminal acts were the immediate, unqualified offspring of such delusion. Erskine there defined a *delusion* to consist in deductions from the *immovable* assumption of the matters *as realities*, either without any foundation whatever, or so distorted and disfigured by fancy as to be nearly the same thing as their creation.

The learned men here have given us many illustrations of such delusions; as that of the man who believes that his legs are of glass, and therefore refuses to move, for fear they will break; of the man who fancies himself the King of the French; or of him who confides to you the precious secret, that he is Emperor of the world. These are palpable delusions, but there are others equally, or even more fatal in their effects, which have their foundation in some original fact, and are thus described by Dr. Ray, at page 210 of his work:

"In another class of cases, the exciting cause of homicidal insanity is of a moral nature, operating upon some peculiar physical

predisposition, and sometimes followed by more or less physical disturbance. Instead of being urged by a sudden imperious impulse to kill, the subjects of this form of the affection, after suffering for a certain period much gloom of mind and depression of spirits, feel as if bound by a sense of necessity to destroy life, and proceed to the fulfilment of their destiny, with the utmost calmness and deliberation. So reluctant have courts and juries usually been to receive the plea of insanity in defence of crime, deliberately planned and executed by a mind in which no derangement of intellect has ever been perceived, that it is of the greatest importance that the nature of these cases should not be misunderstood."

Our learned witnesses have given us various definitions of a delusion. Dr. Hun's is perhaps as clear and accurate as any: "It is a cherished opinion opposed by the sense and judgment of all mankind." In simple speech, it is what is called the predominance of one idea, by which reason is subverted. I shall now show you such a predominance of one idea, as will elucidate the progress of this maniac from the first disturbance of his mind, to the dreadful catastrophe on the shores of the Owasco Lake. That delusion is a star to guide your judgments to an infallible conclusion, that the prisoner is insane. If you mistake its course, and consign him to a scaffold, it will rest over his grave, indicating him as a martyr, and you as erring or unjust Judges.

In April, 1840, Mrs. Godfrey, who resides in the town of Sennett, on the middle road, four miles north-east of Auburn, lost a horse. One Jack Furman, a hardened offender, stole the horse. For some purpose, not now known, he put him in the care of the prisoner, who was seen with him. Both Furman and Freeman were arrested. The former was the real thief and Freeman constructively guilty. Freeman was arrested by Vanderheyden, taken into an upper chamber, and *there declared his innocence of the crime*. He was nevertheless committed to jail. *All* the police, and the most prejudiced of the witnesses for the People, have testified their entire conviction that the prisoner was innocent. Furman was selected by favor as a witness for the People.

Freeman, while in jail, comprehending his danger, and conscious of his innocence, dwelt upon the injustice, until, having no other hope, he broke prison and escaped. Being retaken, he assigned as the reason for his flight, that Jack Furman stole the horse, and was going to swear him into the State Prison. The result was as he apprehended. He was convicted by the perjury of Furman, and sentenced to the State Prison for five years. This was the *first* act in the awful tragedy, of which he is the hero. Let Judges and jurors take warning from its fatal consequences. How deeply this injustice sank into his mind, may be seen from the testimony of Aretas A. Sabin, the keeper, who said to him on the day he entered the prison, "I am sorry to see you come here so young." The prisoner wept. Well would it have been, if this, the last occasion on which the prisoner yielded to that infirmity, had, ominous as it was of such fatal mischief, been understood and heeded.

A year passed away, and he is found in the prison, neglecting his allotted labor, sullen, and morose.

Mr. Seward next traced the progress of the mental derangement of the accused while he was in prison.¹³ He then reviewed, in detail, his conduct and actions from the time he left prison down to the night of the murder, and claimed that it had been shown that a sense of his wrongs had taken complete possession of him, and whatever of mind, conscience or reason remained, had been finally overthrown.¹⁴ His conduct after the murder was next taken up, for the purpose of showing that his past misfortunes were the burden of his life, it having appeared that he always confessed the deed, and in answer to questions put to him to ascertain his motive, the answers were broken and incoherent, but invariably referred to his being in prison innocently, and could get no pay for it.¹⁵

¹³ As shown in the testimony of James E. Tyler, Mr. Van Keuren, Silas E. Baker, W. P. Smith, Theron Green, Rev. Alonzo Wood.

¹⁴ As shown in the testimony of John DePuy, Mrs. Godfrey, Lyman Paine, James H. Bostwick, Mr. Hersey.

¹⁵ As shown in the testimony of George B. Parker, Mr. Vanderheyden, E. A. Warden, W. T. Worden, Dr. Fosgate, John R. Hopkins, Rev. Mr. Austin, Mr. Curtis, Dr. Hermance, Dr. Briggs, William P. Smith.

It would be tedious to gather all the evidence of similar import. Let it suffice, that the witnesses who have conversed with the prisoner, as well those for the People as those for him, concur fully in the same statement of facts, as to his reasons and motives for the murders. We have thus not merely established the existence of an insane delusion, but have traced directly to that overpowering delusion, the crimes which the Prisoner has committed.

How powerful that delusion must have been, may be inferred from the fact that the prisoner, when disabled, desisted from his work, and made his retreat to his friends in Oswego county, not to escape from punishment for the murders, but as he told Mr. E. A. Warden, to wait till his wounded hand should be restored, that he might resume his dreadful butchery; and, as he told Dr. Bigelow, because he couldn't "handle his hand." The intenseness of this delusion exceeds that under which Hatfield assailed the King; that which compelled Henriette Cornier to dissever the head of the child entrusted to her care; and that of Rabello, the Portuguese, who cut to pieces with his axe, the child who trod upon his feet.

The next feature in the cause, which will claim your attention, gentlemen of the jury, is the manner and circumstances of the act itself.

In Ray's Medical Jurisprudence, at page 224, are given several tests by which to distinguish between the homicidal maniac and the murderer.

We shall best consider the present case by comparing it with those tests:

I. "There is the *irresistible, motiveless* impulse to destroy life." Never was homicide more *motiveless*, or the impulse more completely irresistible, than in the present case, as we have learned from the testimony already cited.

II. "In nearly all cases the criminal act has been preceded, either by some well marked disturbance of the health, or by an irritable, gloomy, dejected, or melancholy state; in short, by many of the symptoms of the incubation of

mania." How truly does this language describe the condition of the prisoner during the brief period of his enlargement!

III. "The impulse to destroy is powerfully excited by the sight of murderous weapons—by favorable opportunities of accomplishing the act—by contradiction, disgust, or some other equally trivial and even imaginary circumstance."

While we learn from Hersey's testimony, that the prisoner kept a store of knives fit for such a deed, we find in the denial of his demands for settlement, for pay, and for process, by Mrs. Godfrey and the magistrates, the contradiction and causes of disgust here described.

IV. "The victims of the homicidal monomaniac are either entirely unknown or indifferent to him, or they are amongst his most loved and cherished objects."

Freeman passed by his supposed oppressors and persecutors, and fell upon a family absolutely indifferent, and almost unknown to him, while he reserved the final stroke for his nearest and best friend, and brother-in-law.

V. "The monomaniac sometimes diligently conceals and sometimes avows his purpose, and forms schemes for putting it into execution, testifying no sentiment of grief."

The prisoner concealed his purpose from all but Hersey. He purchased the knife which he used, in open day, at a blacksmith's shop, in the presence of persons to whom he was well known, and ground it to its double edge before unsuspecting witnesses, as coolly and deliberately as if it were to be employed in the shambles. He applied at another blacksmith's shop where he was equally well known, to have another instrument made. He shaped the pattern in a carpenter's shop, carried it to the smith, disagreed about the price, and left the pattern upon the forge, in open sight, never thinking to reclaim it, and it lay there until it was taken by the smith before the coroner's inquest, as an evidence of his design. So strange was his conduct, and so mysterious the form of the knife which he required, that Morris, the smith, suspected him, and told him that he was

going to *kill somebody*; to which he answered with the non-chalance of the butcher, "*that's nothing to you if you get your pay for the knife.*" On the two days immediately preceding the murder, he is found sharpening and adjusting his knives at a turner's shop, next door to his own dwelling, in the presence of persons to whom he is well known, manifesting no apprehension, and affecting no concealment.

The trivial concerns of his finance and occupation are as carefully attended to, as if the murder he was contemplating had been an ordinary and lawful transaction. Hyatt demands three shillings for the knife. The prisoner cheapens until the price is reduced to eighteen pence, with the further advantage that it should be sharpened, and fitted to a handle. Hyatt demands six-pence for putting a rivet into his knife. He compromises, and agrees to divide the labor and pay half the price. He deliberately takes out his wallet and lays down three cents for Simpson, the turner, for the use of the grindstone. On the very day of the murder, he begs some grease at the Soap Factory to soften his shoes, and tells Aaron Demun that he is going into the country to live in peace. At four o'clock in the afternoon he buys soap at the merchant's for Mary Ann Newark, the poor woman at whose house he lived. He then goes cautiously to his room, takes his knives from the place of their concealment under his bed, throws them out of the window, to avoid exposure to her observation, and when the night has come, and the bells are ringing for church, and all is ready, he stops to ask the woman whether there is any *chore* to be done. She tells him, none, but to fill the tub with snow. He does it as carefully as if there were no commotion in his mind, and then sallies forth, takes up his instruments, and proceeds on his errand of death. He reconnoiters the house on the north of Van Nest's, Van Nest's house, and Brooks' house on the south, and finally decides upon the middle one as the place of assault. It does not affect his purpose that he meets Mr. Cox and Mr. Patten, under a broad, bright moonlight. He waits his opportunity, until

Williamson, the visitor, has departed, and Van Arsdale, the laboring man, has retired to rest. With an energy and boldness that no sane man, with such a purpose, could possess, he mortally stabs four persons, and dangerously wounds a fifth, in the incredibly short space of five minutes. Disabled, and therefore desisting from further destruction, he enters the stable, takes the first horse he finds, mounts him without a saddle, and guiding him by a halter, dashes towards the town. He overtakes and passes Williamson, the visitor, within the distance of three-fourths of a mile from the house which he had left in supposed security. Pressing on, the jaded beast, worn out with age, stumbles and brings him to the ground. He plunges his knife into the breast of the horse, abandons him, scours forward through the town, across the bridge and on the middle road to Burrington's; there seizes another horse, mounts him, and urges forward, until he arrives among his relations, the De Puys, at Schroepel, thirty miles distant. They, suspecting him to have stolen the horse, refuse to entertain him. He proceeds to the adjoining village, rests from his flight, offers the horse for sale, and when his title to the horse is questioned, announces his true name and residence, and refers to the De Puys, who had just cast him off, for proof of his good character and conduct. When arrested and charged with the murder, he denies the act.

Now the sixth test given by Ray, is, that "while most maniacs having gratified their propensity to kill, voluntarily confess the act, and quietly give themselves up to the proper authorities, a very few, only, and those to an intelligent observer show the strongest indications of insanity, fly, and persist in denying the act."

VII. "Murder is never criminally committed without some *motive* adequate to the purpose in the mind that is actuated by it, while the insane man commits the crime without any motive whatever, strictly deserving the name."

VIII. "The *criminal* never sheds more blood than is necessary for the attainment of his object. The *monomaniac*

often sacrifices all within his reach, to the cravings of his murderous propensity."

IX. "The *criminal* either denies or confesses his guilt; if the latter, he sues for mercy, or glories in his crimes. On the contrary, the *maniac*, after gratifying his bloody desires, testifies neither remorse, repentance, nor satisfaction."

X. "The *criminal* has accomplices; the *maniac* has none."

XI. "The murderer never conceives a design to murder without projecting a plan for concealing his victim, effecting his escape, and baffling pursuit. The *maniac* prepares the means of committing the crime, with calmness and deliberation, but never dreams of the necessity of concealing it when done, or of escape, until his victim lies at his feet."

Dr. Bigelow and others state that the prisoner told them, as obviously was the case, that he sought no plunder; that he thought not of escape or flight, until his *things* were broken, and his hand was cut, so that he could not continue his work. He seized the nearest and the most worthless horse in the stable, leaving two fleet animals remaining in their stalls. He thought only of taking Burrington's horse when the first failed: all he cared for was to get out of the county, there to rest, until his hand was cured, so that he could come back and do more *work*. He rested from flight within thirty miles from the seat of his crimes, and, in selling his horse, was depriving himself of the only means of making his escape successful. When the person of Van Nest was examined, his watch, pocket-book, money and trinkets were found all undisturbed. Not an article in the house had been removed; and when the prisoner was searched upon his arrest, there was found in his pockets nothing but one copper coin, the hundredth part of a dollar.

Without further detail, the parallel between the prisoner and the tests of madness established by Medical Jurisprudence, is complete.

It remains, gentlemen, to conclude the demonstration of the prisoner's insanity, by referring to the testimony of the witnesses who have given their opinion on that question.

Cornelius Van Arsdale and Helen Holmes, the survivors of that dreadful scene at Van Nest's house, did not think the prisoner insane. The latter had only seen the prisoner for a moment, during the previous week, when he called there and asked for work. The former had never seen him before that fatal night. Both saw him there, only for a moment, and under circumstances exhibiting him as a ruthless murderer. Williamson thinks he was not insane, but he saw the prisoner only when he swept past him, fleeing from his crime. James Amos, Alonzo Taylor, George Burrington, and George B. Parker, say they read no indications of insanity in his conduct when arrested; but neither of them ever saw him before, or has seen him since. Robert Simpson, the turner, George W. Hyatt and Joseph Morris, the blacksmiths, did not suspect him to be insane, when he purchased and sharpened his knives. Neither of them ever knew him before, or has known him since. Nathaniel Lynch, though he furnishes abundant evidence of the prisoner's insanity, is himself unconvinced. Aaron Demun, a colored man, does not think him insane, but stands alone, of all who knew him in his youth. Israel G. Wood and Stephen S. Austin do not think him insane. They were his jailers six years ago, but they have not examined him since his arrest. Vanderheyden and Munroe think him sane, but each testifies under feelings which disqualify him for impartiality. Jonas Brown thinks him not insane, but never saw him, except when he was buying a pound of soap at his store. John P. Hulbert and Benjamin F. Hall had brief conversations with him, in the jail, after his arrest, but made no examination concerning his delusion. Lewis Markham and Daniel Andrus think him not insane, but they have made no examination of the subject; while both give evidence that he was once as bright, active and cheerful, as he is now stupid, senseless and imbecile. Benjamin Van Keuren, Aretas A. Sabin, Silas E. Baker and James E. Tyler, all keepers in the State Prison, and Alonzo Wood, the Chaplain, did not suspect him of insanity in the State Prison. Their conduct

towards him while there, proves their sincerity; but his history under their treatment, will enable you to correct their erroneous judgments. It was their business, not to detect and cure insanity, but to prescribe his daily task, and to compel him by stripes to perform it in silence. Michael S. Myers, the former District Attorney, who prosecuted the prisoner for stealing the horse, looks at him now, and can see no change in his personal appearance; but he has never thought the subject worthy of an examination, and has not, in six years, spoken with or thought of the accused. Lyman Paine and James H. Bostwick, to whom he applied for process, continue now as well convinced of the prisoner's sanity, as they were when he applied to them for warrants, which it was absurd for him to ask. Neither of them has examined him since his arrest, or stopped to compare his conduct in the murder with his application for a warrant, or with the strange delusion which brought him before them.

Such and so feeble is the testimony as to the prisoner's sanity, given by others than the medical witnesses. Nor is the testimony of the medical witnesses on the part of the People entitled to more respect.

Dr. Gilmore pronounces a confident opinion that the prisoner is sane; but the witness is without experience, or any considerable learning on that subject, and his opinion is grounded upon the fact that the accused had intellect enough to prepare for his crime, and sense enough to escape, in the manner so often described. Dr. Hyde visited the prisoner twice in his cell, perhaps thirty minutes each time, and as the result of those visits, says he was rather of the opinion that he was sane. Dr. Hyde expressly disavows any learning or experience on the subject of insanity, and does not give the details of his examination. Dr. David Dimon visited the prisoner several times in jail, but could not discover any thing that he could call insanity. He thinks there can be no insane delusion in this case, because he thinks that an insane delusion is the thorough con-

viction of the reality of a thing, which is opposed by the evidence of the sufferer's senses. The doctor claims neither study nor experience; pronounces the prisoner to be of a grade of intellect rather small for a negro; thinks he has not as much intellect as a child of fourteen years of age, and in regard to knowledge, would compare him with a child two or three years old, who knows his A, B, C, but cannot count twenty-eight. Those who seek the extreme vengeance of the law, will, if successful, need all the consolation to be derived from the sanity of the accused, if, at the age of twenty-three, he be thus imbecile in mind and barren in knowledge. Dr. Jedidiah Darrow has read nothing on the subject of insanity for forty years, and has never had any experience. He declares that his conclusion is not to be regarded as a *professional* opinion. He talked with the prisoner *once* in jail, to ascertain his sanity, and thought it important *to avoid all allusion to the crimes he had committed, their motives, causes and circumstances.* He now thinks that it would have been wise, where monomania was suspected, to examine into the alleged *delusion.* He contents himself with saying, he did not *discover insanity.* Dr. Joseph Clary visited the prisoner in jail: cannot give a decided opinion; his *prevailing* impression is, that the prisoner is not insane, but he has not had opportunities enough to form a correct opinion. He has never seen a case of dementia, and knows it only from definitions in books, which he has never tested. Dr. Bigelow, physician to the prison, discovered nothing in his examinations which led him to suspect insanity. The doctor has a salary of five hundred dollars per annum; his chief labor in regard to insanity is to detect counterfeits in the prison; and although he admits that the prisoner has answered him freely, and unsuspectingly, and fully, he accounts for the condition of his mind, by saying that he regards him "*as an ignorant, dull, stupid, degraded, debased, and morose, but not insane person.*" Dr. Sylvester Willard, without particular experience or learning in this branch, concurs in these opinions.

Dr. Thomas Spencer, professor in the Medical College at Geneva, brings up the rear of the People's witnesses. I complain of his testimony, that it was covered by a mask battery. The District Attorney opened the case with denunciations of scientific men, said that too much learning made men mad, and warned you therefore against the educated men who might testify for the prisoner. I thought at the time that these were extraordinary opinions. I had read,

"A little learning is a dangerous thing,
Drink deep or taste not the Pierian Spring;
These shallow draughts intoxicate the brain,
But drinking largely sobers us again."

What was my surprise to find that all these denunciations against learning and experience, made by the counsel for the People, were only a cover for Dr. Spencer.

He heralds himself as accustomed to teach, and informs us that he has visited the principal hospitals for the insane in London, Paris, and other European capitals. How unfortunate it was that on his cross examination, he could not give the name or location of any asylum in either of those cities! Even the names and locations of the "Charenton" and "Bicetre" had escaped his memory.

But it is no matter. The doctor overwhelms us with learning, universal and incomprehensible. Here is his map of the mental faculties, in which twenty-eight powers of mind are described in odd and even numbers.

The arrows show the course of ideas through the mind. They begin with the motives in the region of the highest odd numbers in the south-west corner of the mind, marked A, and go perpendicularly northward, through Thirst and Hunger to Sensation, marked B; then turn to the right, and go eastward, through Conception, to Attention, marked C, and then descend southward, through Perception, Memory, Understanding, Comparison, Combination, Reason, Invention, and Judgment; wheel to the left under the Will, marked D, and pass through Conscience, and then to V, the unascertained center of Sensation, Volition, and Will. This is the natural

turnpike road for the ideas when we are awake and sane. But here is an open shunpike, X, Y, Z, on which Ideas, when we are asleep or insane, start off and pass by Conscience, and so avoid paying toll to that inflexible gate-keeper. Now all this is very well, but I call on the doctor to show how the fugitive idea reached the Will at D, after going to the end of the shun-pike. It appeared there was no other way but to dart back again, over the shun-pike, or else to go cringing, at last, through the iron gate of Conscience.

Then there was another difficulty. The doctor forgot the most important point on his own map, and could not tell, from memory, where he had located "*the unascertained centre.*"

The doctor pronounces the prisoner sane because he has the chief intellectual faculties, Sensation, Conception, Attention, Imagination, and Association. Now here is a delicate piece of wooden cutlery, fabricated by an inmate of the lunatic asylum at Utica, who was acquitted of murder on the ground of insanity. He who fabricated it evinced in the manufacture, Conception, Perception, Memory, Comparison, Attention, Adaptation, Co-ordination, Kindness, Gratitude, Mechanical Skill, Invention, and Pride. It is well for him that Dr. Spencer did not testify on his trial.

Opposed to these vague and unsatisfactory opinions is the evidence of Sally Freeman, the prisoner's mother, who knew him better than any other one; of John De Puy, his brother-in-law and intimate friend; of Ethan A. Warden, his employer in early youth; of Deborah De Puy, his associate in happier days; of Adam Gray, who knew him in childhood, and sheltered him on his discharge from the state prison; of Ira Curtis, in whose family he resided seven years ago; of David Winner, the friend of his parents; of Robert Freeman, his ancient fellow servant at the American Hotel; of John R. Hopkins, an intelligent and practical man who examined him in jail; of Theron Green, who discovered his insanity in the state prison; of the Rev. John M. Austin, the one good Samaritan who deemed it a pastoral duty to

visit even a supposed murderer in prison; of William P. Smith, who has corrected now the error of his judgment while in the state prison; of Philo H. Perry, a candid and enlightened observer; and of Warren T. Worden, a lawyer of great shrewdness and sagacity.

Then there is an overwhelming preponderance of medical testimony. The witnesses are, Dr. Van Epps, who has followed the accused from his cradle to the present hour, with the interest of a humane and sincere friend; Dr. Fosgate, who attended him in the jail, for the cure of his disabled limb; Dr. Briggs, equal in public honors to Dr. Bigelow, and greatly his superior in candor as well as learning, and who compares the prisoner now with what he was in better days; Dr. McNaughton, of Albany, and Dr. Hun, of the same place, gentlemen known throughout the whole country for eminence in their profession; Dr. McCall, of Utica, president of the Medical Society of the State of New York; Dr. Coventry, professor of medical jurisprudence in Geneva College, and one of the managers of the State Lunatic Asylum at Utica; and Dr. Brigham, the experienced and distinguished superintendent of that institution. This last gentleman, after reviewing the whole case, declares that he has no doubt that the prisoner is now insane, and was so when his crimes were committed; that he should have received him as a patient then, on the evidence given here, independently of the crime, and should now receive him upon all the evidence which has been submitted to you.

Dr. Brigham pronounces the prisoner to be a *Monomaniac* laboring under the overwhelming progress of the delusion I have described, which had its paroxysm in the murders of which he is accused; and declares that since that time he has sunk into a deep and incurable *Dementia*, the counterpart of idiocy. In these opinions, and in the reasons for them, so luminously assigned by him, all the other medical gentlemen concur.

You may be told, gentlemen, that Dr. Hun and Dr. McNaughton testified from mere observation of the prisoner

without personal examination. Yes! I will thank the Attorney-General for saying so. It will recall the strangest passages of all, in this the strangest of all trials. This is a trial for murder. A verdict of guilty will draw after it a sentence of death. The only defence is insanity. Insanity is to be tested by examining the prisoner as he *now* is, and comparing him with what he *was* when the crime was committed, and during all the intervening period, and through all his previous life. Dr. Hun and Dr. McNaughton were served with subpoenas, requiring them to attend here. They came, proceeded to the jail, and examined the prisoner on Wednesday night during the trial. Early on Thursday morning they proceeded again to the jail to resume their examination, and were then denied access. It is proved that the Attorney-General instructed the Sheriff to close the doors against them, and the Attorney-General admits it. Dr. Hun and Mr. McNaughton are called to testify, and are ready to testify that the examination they did make, satisfied them that the prisoner is insane, and that he was insane when he committed the homicide. The Attorney-General objects and the Court overrules the evidence, and decides that these eminent physicians shall testify only from mere external observation of the prisoner, in Court, and shall expressly forget and lay aside their examinations of the prisoner, made in jail, by conversations with him. Nor was the process by which the Court effected this exclusion less remarkable than the decision itself. The Court had obtained a verdict on the sixth of July, on the preliminary issue, that the prisoner was sufficiently sane to distinguish right from wrong. That verdict has been neither *pleaded* nor *proved* on this trial, and if it had been, it would have been of no legal value. Yet the Court founds upon it a judicial statute of limitations, and denies us all opportunity to prove the prisoner insane, after the sixth of July. I tremble for the jury that is to respond to the popular clamor under such restraints as these. I pray God that these Judges may never experience the consequences which must follow such

an adjudication. But, gentlemen, Dr. Hun and Dr. McNaughton hear, nevertheless, the strongest testimony that the prisoner is an *idiot*, as appears by observation, and that the evidence, as submitted to them, confirms this conviction.

There is proof, gentlemen, stronger than all this. It is silent, yet speaking. It is that *idiotic smile* which plays continually on the face of the maniac. It took its seat there while he was in the state prison. In his solitary cell, under the pressure of his severe tasks and trials in the work-shop, and during the solemnities of public worship in the chapel, it appealed, although in vain, to his task-masters and his teachers. It is a smile, never rising into laughter, without motive or cause—the smile of vacuity. His mother saw it when he came out of prison, and it broke her heart. John De Puy saw it and knew his brother was demented. Deborah De Puy observed it and knew him for a fool. David Winner read in it the ruin of his friend, Sally's son. It has never forsaken him in his later trials. He laughed in the face of Parker, while on confession at Baldwinsville. He laughed involuntarily in the faces of Warden, and Curtis, and Worden, and Austin, and Bigelow, and Smith, and Brigham, and Spencer. He laughs perpetually here. Even when Van Arsdale showed the scarred traces of the assassin's knife, and when Helen Holmes related the dreadful story of the murder of her patrons and friends, he laughed. He laughs while I am pleading his griefs. He laughs when the Attorney-General's bolts would seem to rive his heart. He will laugh when you declare him guilty. When the Judge shall proceed to the last fatal ceremony, and demand what he has to say why the sentence of the law should not be pronounced upon him, although there should not be an unmoistened eye in this vast assembly, and the stern voice addressing him should tremble with emotion, he will even then look up in the face of the Court and laugh, from the irresistible emotions of a shattered mind, delighted and lost in the confused memory of absurd and ridiculous associations. Follow him to the scaffold. The executioner cannot

disturb the calmness of the idiot. He will laugh in the agony of death. Do you not know the significance of this strange and unnatural risibility? It is a proof that God does not forsake even the poor wretch whom we pity or despise. There are, in every human memory, a well of joys and a fountain of sorrows. Disease opens wide the one, and seals up the other forever.

You have been told, gentlemen, that this smile is hereditary and accustomed. Do you think that ever ancestor or parent of the prisoner, or even the poor idiot himself, was in such straits as these? How then can you think that this smile was ever before recognized by these willing witnesses? That chaotic smile is the external derangement which signifies that the strings of the harp are disordered and broken, the superficial mark which God has set upon the tabernacle, to signify that its immortal tenant is disturbed by a Divine and mysterious commandment. If you cannot see it, take heed that the obstruction of your vision be not produced by the mote in your own eye, which you are commanded to remove before you consider the beam in your brothers eye. If you are bent on rejecting the testimony of those who know, by experience and by science, the deep afflictions of the prisoner, beware how you misinterpret the hand-writing of the Almighty.

I have waited until now, gentlemen, to notice some animadversions of the counsel for the People. They say that drunkenness will explain the conduct of the prisoner. It is true that John De Puy discovered that those who retailed poisonous liquors were furnishing the prisoner with this, the worst of food for his madness. But the most laborious investigation has resulted in showing, by the testimony of Adam Gray, that he once saw the prisoner intoxicated, and that he, with some other persons, drank spirits in not immoderate quantity, on the day when Van Nest was slain. There is no other evidence that the prisoner was ever intoxicated. John De Puy and Adam Gray testify that except that one time he was always sober. David Winner

proves he was sober all the time the witness lived at Willard's, and Mary Ann Newark says he was entirely sober when he sallied forth on his fatal enterprise. The only value of the fact of his drunkenness, if it existed, would be to account for his disturbed nights at De Puy's, at Gray's and at Willard's. It is clearly proved that his mind was not beclouded, nor his frame excited, by any such cause on any of those occasions; and Doctor Brigham truly tells you that while the maniac goes quietly to his bed, and is driven from it by the dreams of a disturbed imagination, the drunkard completes his revels and his orgies before he sinks to rest, and then lies stupid and besotted until nature restores his wasted energies with return of day.

Several of the prisoner's witnesses have fallen under the displeasure of the counsel for the People. John De Puy was asked on the trial of the preliminary issue, whether he had not said, when the prisoner was arrested, that he was no more crazy than himself. He answered, that he had not said "in those words," and asked leave to explain by stating what he had said. The Court denied him the right and obliged him to answer, Yes or No, and of course he answered No. On this trial he makes the explanation, that after the murder of Van Nest, being informed that the prisoner had threatened his life, he said, "Bill would do well enough if they wouldn't give him liquor; he was bad enough at any time, and liquor made him worse." By a forced construction, this declaration, which substantially agrees with what he is proved by other witnesses to have said, is brought in conflict with his narrow denial, made on the former trial. It has been intimated on this trial, that the counsel for the Prosecution would contend that John De Puy was an accomplice of the prisoner and the instigator of his crimes. This cruel and unfeeling charge has no ground, even in imagination, except that twelve years ago De Puy labored for six weeks on the farm of the late Mr. Van Nest, then belonging to his father-in-law, Peter Wyckoff, that a misunderstanding arose between them, which they adjusted

by arbitration, and that they were friends always afterwards. The elder Mr. Wyckoff died six years ago. It does not appear that the late Mr. Van Nest was even married at that time. John De Puy is a colored man, of vigorous frame, and strong mind, with good education. His testimony, conclusive in this cause, was intelligently given. He claims your respect as a representative of his people, rising to that equality to which it is the tendency of our institutions to bring them. I have heard the greatest of American orators. I have heard Daniel O'Connell and Sir Robert Peel, but I heard John De Puy make a speech excelling them all in eloquence: "They have made William Freeman what he is, a brute beast; they don't make anything else. of any of our people but brute beasts; but when we violate their laws, then they want to punish us as if we were men." I hope the Attorney-General may press his charge; I like to see persecution carried to such a length; for the strongest bow, when bent too far, will break.

Deborah De Puy is also assailed as unworthy of credit. She calls herself the wife of Hiram De Puy, with whom she has lived ostensibly in that relation for seven years, in, I believe, unquestioned fidelity to him and her children. But it appears that she has not been married with the proper legal solemnities. If she were a white woman, I should regard her testimony with caution, but the securities of marriage are denied to the African race over more than half this country. It is within our own memory that the master's cupidity could divorce husband and wife within this state, and sell their children into perpetual bondage. Since the Act of Emancipation here, what has been done by the white man to lift up the race from the debasement into which he had plunged it? Let us impart to negroes the knowledge and spirit of Christianity, and share with them the privileges, dignity and hopes of citizens and Christians, before we expect of them purity and self respect.

But, gentlemen, even in a slave state, the testimony of this witness would receive credit in such a cause, for ne-

groes may be witnesses there, for and against persons of their *own* caste. It is only when the life, liberty or property of the white man is invaded, that the negro is disqualified. Let us not be too severe. There was once upon the earth a Divine Teacher who shall come again to judge the world in righteousness. They brought to Him a woman taken in adultery, and said to Him that the law of Moses directed that such should be stoned to death, and He answered: "Let him that is without sin cast the first stone."

The testimony of Sally Freeman, the mother of the prisoner, is questioned. She utters the voice of nature. She is the guardian whom God assigned to study, to watch, to learn, to know what the prisoner was, and is, and to cherish the memory of it forever. She could not forget it if she would. There is not a blemish on the person of any one of us, born with us or coming from disease or accident, nor have we committed a right or wrong action, that has not been treasured up in the memory of a mother. Juror! roll up the sleeve from your manly arm, and you will find a scar there of which you know nothing. Your mother will give you the detail of every day's progress of the preventive disease. Sally Freeman has the mingled blood of the African and Indian races. She is nevertheless a woman, and a mother, and nature bears witness in every climate and every country, to the singleness and uniformity of those characters. I have known and proved them in the hovel of the slave, and in the wigwam of the Chippewa. But Sally Freeman has been intemperate. The white man enslaved her ancestors of the one race, exiled and destroyed those of the other, and debased them all by corrupting their natural and healthful appetites. She comes honestly by her only vice. Yet when she comes here to testify for a life that is dearer to her than her own, to say she knows her own son, the white man says she is a drunkard! May Heaven forgive the white man for adding this last, this cruel injury to the wrongs of such a mother! Fortunately, gentlemen, her character and conduct are before you. No woman has

ever appeared with more decency, modesty, and propriety than she has exhibited here. No witness has dared to say or think that Sally Freeman is not a woman of truth. Dr. Clary, a witness for the prosecution, who knows her well, says, that with all her infirmities of temper and of habit, Sally "was always a truthful woman." The Roman Cornelia could not have claimed more. Let then the stricken mother testify for her son.

"I ask not, I care not—if guilt's in that heart,
I know that I love thee, whatever thou art."

The learned gentlemen who conduct this prosecution have attempted to show that the prisoner attended the trial of Henry Wyatt, whom I defended against an indictment for murder, in this Court, in February last; that he listened to me on that occasion, in regard to the impunity of crime, and that he went out a ripe and complete scholar. So far as these reflections affect me alone, they are unworthy of an answer. I pleaded for Wyatt then, as it was my right and my duty to do. Let the counsel for the People prove the words I spoke, before they charge me with Freeman's crimes. I am not unwilling those words should be recalled. I am not unwilling that any words I ever spoke in any responsible relation, should be remembered. Since they will not recall those words, I will do so for them. They were words like those I speak now, demanding cautious and impartial justice; words appealing to the reason, to the consciences, to the humanity of my fellow men; words calculated to make mankind know and love each other better, and adopt the benign principles of Christianity, instead of the long cherished maxims of retaliation and revenge. The creed of Mahomet was promulgated at a time when paper was of inestimable value, and the Koran teaches that every scrap of paper which the believer has saved during his life, will gather itself under his feet, to protect them from the burning iron which he must pass over, while entering into Paradise. Regardless as I have been of the unkind construction

of my words and actions by my cotemporaries, I can say in all humility of spirit, that they are freely left to the ultimate, impartial consideration of mankind. But, gentlemen, how gross is the credulity implied by this charge! This stupid idiot, who cannot take into his ears, deaf as death, the words which I am speaking to you, though I stand within three feet of him, and who even now is exchanging smiles with his and my accusers, regardless of the deep anxiety depicted in your countenances, was standing at yonder post, sixty feet distant from me, when he was here, if he was here at all, on the trial of Henry Wyatt. The voice of the District Attorney reverberates through this dome, while mine is lost almost within the circle of the bar. It does not appear that it was not that voice that beguiled the maniac, instead of mine; and certain it is, that since the prisoner does not comprehend the object of his attendance here now, he could not have understood anything that occurred on the trial of Wyatt.

Gentlemen, my responsibilities in this cause are discharged. In the earnestness and seriousness with which I have pleaded, you will find the reason for the firmness with which I have resisted the popular passions around me. I am in some degree responsible, like every other citizen, for the conduct of the community in which I live. They may not inflict on a maniac the punishment of a malefactor, without involving me in blame, if I do not remonstrate. I cannot afford to be in error, abroad and in future times. If I were capable of a sentiment so cruel and so base, I ought to hope for the conviction of the accused; for then the vindictive passions, now so highly excited, would subside, the consciences of the wise and the humane would be awakened, and in a few months, the invectives which have so long pursued me, would be hurled against the jury and the Court.

You have now the fate of this lunatic in your hands. To him as to me, so far as we can judge, it is comparatively indifferent what be the issue. The wisest of modern men has left us a saying, that "the hour of death is more for-

tunate than the hour of birth," a saying which he signalized by bestowing a gratuity twice as great upon the place where he died as upon the hamlet where he was born. For ought that we can judge, the prisoner is unconscious of danger and would be insensible to suffering, let it come when it might. A verdict can only hasten, by a few months or years, the time when his bruised, diseased, wandering and benighted spirit shall return to Him who sent it forth on its sad and dreary pilgrimage.

The circumstances under which this trial closes are peculiar. I have seen capital cases where the parents, brothers, sisters, friends of the accused surrounded him, eagerly hanging upon the lips of his advocate, and watching in the countenances of the Court and jury, every smile and frown which might seem to indicate his fate. But there is no such scene here. The prisoner, though in the greenness of youth, is withered, decayed, senseless, almost lifeless. He has no father here. The descendant of slaves, that father died a victim to the vices of a superior race. There is no mother here, for her child is stained and polluted with the blood of mothers and of a sleeping infant; and "he looks and laughs so that she cannot bear to look upon him." There is no brother, or sister, or friend here. Popular rage against the accused has driven them hence, and scattered his kindred and people. On the other side I notice the aged and venerable parents of Van Nest, and his surviving children, and all around are mourning and sympathizing friends. I know not at whose instance they have come. I dare not say they ought not to be here. But I must say to you that we live in a Christian and not in a savage state, and that the affliction which has fallen upon these mourners and us, was sent to teach them and us mercy and not retaliation; that although we may send this maniac to the scaffold, it will not recall to life the manly form of Van Nest, nor reanimate the exhausted frame of that aged matron, nor restore to life, and grace, and beauty, the murdered mother, nor call back the infant boy from the arms of his Savior. Such a verdict

can do no good to the living, and carry no joy to the dead. If your judgment shall be swayed at all by sympathies so wrong, although so natural, you will find the saddest hour of your life to be that in which you will look down upon the grave of your victim, and "mourn with compunctuous sorrow" that you should have done so great injustice to the "poor handful of earth that will lie mouldering before you."

I have been long and tedious. I remember that it is the harvest moon, and that every hour is precious while you are detained from your yellow fields. But if you shall have bestowed patient attention throughout this deeply interesting investigation, and shall in the end have discharged your duties in the fear of God and in the love of truth justly and independently, you will have laid up a store of blessed recollections for all your future days, imperishable and inexhaustible.

THE ATTORNEY-GENERAL FOR THE PEOPLE.

Mr. Van Buren. Gentlemen of the Jury: It did not need the very able argument that has been submitted to you by the prisoner's counsel, to remind the prosecution of the great disadvantage the people have labored under in conducting this case. The learned gentleman who has just addressed you, has not only brought to the task his usually great ability, but throughout the trial, as well as in his closing argument, has seemed to believe, and I fear has impressed the jury with the belief, that his own character and position, rather than those of the prisoner, are involved in your decision. I beg you to dismiss any such idea. That distinguished citizen has spent the larger portion of his life amongst you; he is your neighbor and friend; and if he were upon trial, it would better become a stranger like me, and be more agreeable to my inclinations, to enter a *nolle prosequi*, than press for a conviction.

It is a gratifying feature in our institutions, that an ignorant and degraded criminal like the prisoner, who has spent a large portion of his life in prison; vicious and in-

temperate in his habits; of a race socially and politically debased; having confessedly slaughtered a husband, wife, son and mother-in-law, composing one of the first families in the state; and arrested with but one cent in his pocket, can enlist in his defence the most eminent counsel in the country, bring upon the witness' stand professors of the highest distinction in their departments of science, members and trustees of churches, and even pious divines. It is particularly gratifying to those whose official duty requires them to participate in this prosecution, because it assures them that there is no danger that the slightest injustice can be done to the prisoner from an inability to secure friends and testimony, at any distance or at any cost. It is also gratifying to those who desire to see an impartial administration of justice, that the prisoner has been able to select a jury under circumstances that so clearly forbid the idea that his rights are endangered by passion or prejudice. Three of the jurors have been selected from a panel which were present during the whole preliminary proceedings in this case, and which was exhausted without the exercise of a single peremptory challenge; and from the thirty talesmen who had been then summoned, the requisite number to complete the panel have been chosen, using only nine out of the twenty peremptory challenges which the law allows him. Everything thus indicated that a calm and dispassionate examination would be given to a case which had once deeply and naturally excited the community; that at all events, however imperfectly the rights of the people might be protected or presented, the strong public sympathy which always turns its back upon the dead and its face towards the living, and the sturdy independence which stands by the weak and helps the helpless, had attracted to the prisoner and enlisted in his cause an unsurpassed combination of kind feeling, rare intellect, extensive learning, and vast acquirements.

That the prisoner at the bar slew John G. Van Nest at the time and in the manner charged in the indictment, is

not now (said Mr. V. B.) a fact in dispute. His defence is made to rest on the ground of insanity. And there is to me something so repulsive in the idea of trying an insane man—so horrid is it to contemplate the possibility of holding a man responsible for the commission of an act which he could not understand or avert—that I gladly availed myself of the request of Mr. Seward, to visit the prisoner with him before the preliminary enquiry, that I might at least be satisfied of the propriety of my own conduct. I did so with the hope of feeling authorized to postpone this trial; and in a short intercourse, I became perfectly convinced that at that time the prisoner at the bar was sane. I did say, as has so often been repeated, that if I believed I could not detect or suspect insanity in an individual when apprised of it beforehand, at liberty to converse freely with him, and having my attention drawn to the peculiarity of his derangement, I would resign the office I hold. I repeat the assertion now; and I will only add, that nothing in the course of this trial has in any degree weakened my conviction of the prisoner's sanity. And that he was sane on the 12th of March, when the murder was committed, is not only established by the testimony, but laying out of view the murder itself, there is not a particle of evidence of any act or declaration on his part for several weeks before the tragedy, during its commission, or for several days subsequent, on which a suspicion of insanity could be raised. His minute history has been furnished by the defence from nursing childhood to the sixth of this month—the history of a well known man, born and brought up here, where he is on trial. But the history is silent when it approaches the date of this fearful transaction. It glides almost without touching, over the days of preparation and the sad night of performance; it carefully avoids the darkness and day of flight; it does not indulge us with the interview with the De Puys in Oswego, friends and connections though they be of the prisoner; it skips from the perjured John De Puy in December, and the friendly black Adam Gray in January, over

to the theological and scientific conversations in the jail after the arrest, when the defence of insanity was interposed or determined on. What means this great chasm? Why is the testimony so barren while the delirium must have been most intense? Why is not Mrs. Willard called, with whom the prisoner lived after he quit Adam Gray's? Why has not Mary Ann Newark, with whom he lived at the time of the murder, and for ten days before, been able to state some careless remark, some odd gesture, some unwillingness or inability to sleep, arising from insanity, ill health, or intemperance? Why has not some witness been called by the defence, who spoke with the prisoner within ten days of the crime? Where are the Oswego De Puys, to whom Freeman fled, with whom he sought refuge the day after the murder, and who turned him out of the house suspecting he had stolen the horse? This vacuum has been supplied by the prosecution, and a future recurrence to it will show that it all tends with unerring certainty to one point—the guilt of the prisoner.

The preliminary proceedings in the case have established nothing except that the prisoner should be tried. It is not correct to call the interposition by the prisoner's counsel of the objection of insanity, a plea of inanity. The prisoner had not then been arraigned, and the objection taken was not to the indictment, but to a trial. We have, therefore, consumed a fortnight in determining whether the prisoner shall be tried; in the course of which nearly all the testimony we now have, has been detailed to another jury to satisfy them that the prisoner was insane, when they were called on to determine the state of his mind. They were not able to come to such a conclusion. He has since been arraigned, plead not guilty, the evidence again detailed before you, and the defence insisted on, that he was insane on the 12th of March last, when the murder was committed. The extraordinary doctrines put forth upon the subject of insanity in the course of this trial; the wonderful effort made to procure the acquittal of this prisoner; the extreme

length to which the proceedings have been protracted—all conspire to excite the public mind, and to render the result to which you shall come, a matter of immense moment. The defence of insanity differs from all others in this—that the declarations and acts of the prisoner constitute this defence. In every other criminal case they are not even admissible in evidence. And the peculiarity of this case is, that the testimony on which insanity is predicated, so far as it comes from scientific or credible witnesses, consists of the acts and declarations of the prisoner after the first Monday of June last, when he had been arrested for this crime, identified by Van Arsdale, (who, being alive, must secure his conviction,) and had interposed the defence of insanity!

William Freeman was born and brought up in Auburn. For five years prior to last September he was in the Auburn State Prison. The medical gentlemen who are his witnesses testify that he has *dementia*, which is a form of insanity gradual in its approaches. John De Puy swears he was crazy in prison. He resided in Auburn nearly his entire life. How then does it happen that every important fact on which the jury are asked to believe that he was insane on the 12th of March last, should have occurred since the first Monday of June, and under the circumstances I have stated? I ask you, without seeking to cast the slightest suspicion on the counsel for the prisoner, whether these considerations do not require you to scrutinize strictly a defence which can always be manufactured easily, and which comes to you in this instance under such extraordinary circumstances? An atrocious slaughter has been perpetrated; the instrument by which it was effected is in your hands, to be disposed of, and it is unnecessary for me to say to you that your own safety, public justice, the existence even of law and government, may be affected by your action.

Was the prisoner insane on the 12th of March last?

Insanity, as constituting legal incompetency or irresponsibility, must be within the comprehension of any ordinary

man of fair capacity. I deny and resist the theory of the professors, who have made insanity their peculiar study, that an ordinary man can't comprehend it—a theory which substitutes the testimony of a physician, as to legal responsibility, for the law of the land—expels the Judge from the bench and the jury from the box—overturns the government, and places the property, liberty, and life of any citizen in the hands of the trustees and superintendents of lunatic asylums.

No legal act can be done by a person of unsound mind. Does an individual execute a deed? His legal capacity is disputed, and medical gentlemen deny it. Does he make a will? His dissatisfied connections seek to set it aside. Every peculiarity that he ever manifested, every odd remark, thoughtless act, singular gesture, is appealed to, to establish his incompetency; and medical gentlemen not only pronounce their opinion of the state of his mind, but they insist that ordinary observers are incapable of forming an opinion upon it. An individual commits a crime. If he is not of sound mind, he is irresponsible; and medical men in all these cases claim to render the verdict and pronounce the judgment. The jury thus sees the infinite extent to which a surrender of their individual judgments might lead, and the absolute control of property, liberty, and life, that might thus be transferred to men of scientific pursuits. The security of all these great interests rests on the trial by jury, and our institutions are founded on the capacity of jurors to determine intelligently every question presented to them.

Criminal irresponsibility is a question of law, not of medicine. Were it otherwise—did the detection of offenders or the prevention of crime depend upon medical skill, our police should be composed of physicians and nurses. The moral insanity which is induced by a predominance of the passions, and which irresistibly impels to the commission of crime, such as Pyromania, Cleptomania, Erotomania, Nymphomania, Homicidalmonomania, must be detected by the tongue and the pulse. Our families cannot walk the

streets in safety till they have been swept by a squadron of doctors; and if the punishment of crime is to be determined by medical rules, the professors should sit upon the bench and fill the jury box. This prosecution is unsuitably conducted. The executive of the state should have sent the Surgeon General instead of the Attorney-General to assist at this trial. But no, gentlemen! the law allows no such absurdities. You receive the testimony of medical men. You receive their opinions and hear the grounds on which they rest. The immense latitude which has been allowed them on this trial, has given you abundant opportunities of testing their skill, judgment and information; and with the aid of these, and with a statement of the law in regard to responsibility as it has stood for ages, with safety to the people and security to the rights of the criminal, you determine for yourselves the guilt or innocence of this prisoner. And now, after all the efforts that have been made to establish the immunity of the prisoner, by calling clergymen to testify that he has no moral sense—that he is not morally responsible; medical professors to prove that he ought not to be punished—that they consider him diseased with insanity; lawyers to swear that he knows no more than a dumb beast, and cannot distinguish between killing a horse and a man; and a prison keeper to prove that he did not punish him because he did not consider him responsible, let us turn to the law to see what state of facts the prisoner *must* prove, before you are authorized to acquit this frightful homicide of being a wilful murderer. And let me stop a moment to say that those who claim that vast improvements have been made in the science of insanity; that the early tests of insanity were barbarous and inhuman; that the law now falls behind science in determining irresponsibility; and that, therefore, juries should take the law from the lips of medical witnesses on the stand, in preference to the law-givers of the Constitution, speak, as it seems to me, without examination or reflection, and without due knowledge of the enlightened wisdom, learning and humanity they

condemn, or of the fearful hazards they propose to encounter.

Who may, and who may not kill, it concerned society to have decided as far back as the time of Cain and Abel; and whilst we concede that vast improvement has been made in the treatment of the insane, a reference to the simple and early tests of legal irresponsibility, under which well ordered communities have existed to this time, will show that no other has ever been furnished by the successive wisdom of ages or the humanizing spirit which has waited on this wisdom and pervaded criminal legislation. Under this test, too, uniformly laid down by English and American Judges and commentators, prisoners indicted for the highest crimes have been acquitted. Hadfield, who shot at George III in 1800, and was indicted for high treason, was acquitted. Oxford, who shot at the Queen in 1840, and was indicted for high treason, was acquitted. McNaughton, who killed Mr. Drummond, secretary to Sir Robert Peel, in 1843, was acquitted. In each case the defence was insanity. The eloquence, therefore, that inveighs against the barbarity of our laws; against the severity of Hale and Blackstone; the oppression of our Courts and of those of Great Britain; and calls upon us to reject the tried experience and security of law, and cleave to the subtleties of the asylum, does not spring from past evil or danger, and finds no justification in the history of English jurisprudence. So far from it, a student or lover of the principles of justice, finds in it everything to confirm his preference of the enlightened liberty of the old common law over the vagaries of the new schools.

What, then, is the unsoundness of mind and memory which renders the subject of it incompetent and irresponsible? In a criminal case, it is an incapacity to distinguish between right and wrong in regard to the particular act committed, or an inability from disease to resist the commission of the act. This is the earliest and latest definition of insanity, in the legal understanding of the term, and covers every case where a party is excused in law from the

responsibility of his acts. This defence is to be established beyond reasonable doubt by satisfactory evidence. The law presumes a person to be sane till his insanity is proved.

Let us advert to the authorities. Not to Esquirol, Pritchard, Ray, Pinel; but to Coke, Hale, Blackstone, Kenyon, Denman, Maule, Tyndall, Van Nest, Verplanck, and to other luminaries of the law, under whose administration and teaching the public peace and happiness have reposed securely for centuries.¹⁶

What then is the inquiry that this review of adjudged cases, and reference to established authorities, calls upon you to make in this case? The simple question for you to determine is, had the prisoner, when he killed John G. Van Nest, sufficient capacity to judge whether it was right or wrong so to do? And if he had, did any disease divest him of control over his actions?

You are not called upon to determine the extent or nature of his information or acquirements. It is not material what are his views on the subject of religion, morality or law. He may deny the existence of a Supreme Being—reject Revelation and believe that the Son of God was a man; he may think he was wrongfully imprisoned—that he ought to be paid for the time he has lost and the labor he has performed; he may make unsuccessful attempts to obtain pay; failing of this, he may levy war on society and kill the first man he meets;—and yet he is no less amenable to punishment.

Ignorance of no kind excuses. Mr. Hopkins errs in supposing that “the extent of information is the measure of responsibility.” A criminal may never read or hear of a statute; nevertheless, public safety requires that he should be punished for a violation of it, if he knows the act he is committing is wrong. In the vast majority of cases it is

¹⁶ The Attorney-General read extracts from Lord Coke, Hale, Blackstone, Allison's Criminal Law of Scotland, the trials of Hadfield, Oxford, and McNaughton, Jackson v. Van Dusen, 5 Johns 158, Lipsenar v. Will, 26 Wend. 265.

the ignorant and irreligious that commit crimes. Dr. Fosgate errs in thinking that "the law could not impose any rules or regulations upon the human constitution as it is given by the Almighty." His theory happens to overturn the precise office of all government, human and divine. To borrow an illustration of the doctor, "a dog in a sound state of mind" ought not so entirely to overlook the very end for which governments were instituted.

This prisoner may really believe that when he was struck with a board, his hearing was knocked down his throat; he may believe he can read and count, when he cannot; (this, I presume everyone believes who reads and counts inaccurately;) he may think Van Nest said to him "if you eat my liver, I'll eat yours;" he may think Jesus Christ is a man whom he met at Sunday School; he may have killed the Van Nest family for revenge, plunder, amusement, or for no conceivable cause; he may be deaf, ignorant, morally insensible, eccentric, willful;—still by the law he *must* be punished, if he voluntarily did what he knew to be wrong. It is not accomplishment, refinement, morality or religion, but accountability that the law regards. The Supreme Ruler of the Universe holds to the same rule. Neglected opportunities, willful ignorance, deadened moral sense, and inveterate depravity, will avail as little hereafter as here, in saving sinners from responsibility. The only inquiry will be—had they capacity to know the right, and physical ability to pursue it?

Let us apply this test to the prisoner's case.

Sanity is the natural state of man. The law presumes a party to be sane; and we having proved the commission of the acts charged in the indictments, the prisoner must be convicted unless he has satisfied you beyond all reasonable doubt, that when they were committed he was irresponsible.

We are asked what motive the prisoner had in committing these murders. We answer, frankly, that we cannot say. If you were bound to find his motive, on oath, although the testimony would incline you to the belief that his purpose

was revenge, you would not in a case of life and death be willing so to find. The testimony shows that he was five years imprisoned on a conviction for larceny, as he claimed wrongfully; that he refused to work on that ground; that on coming out of prison last September, he inquired for Jack Willard, who was a witness against him on his trial; and that he went several times to a Justice of the Peace to get warrants for those who swore against him. Shortly before the murder he made several efforts to get redress for having been sent to prison. He went two days before to Squire Bostwick. The Saturday or Monday before, he went to Squire Paine. To him he complained of his inability to get work. He had been on the previous Monday to the house of Van Nest, who refused to employ him. He was well acquainted with the premises, having previously lived on them. The horse, for the stealing of which he had been convicted, was stolen of Martha Godfrey. He visited her just before the murder and inquired in regard to it—said he had been wrongfully imprisoned for stealing it, and wanted a settlement. There is no doubt that he supposed that Van Nest was concerned in his conviction. Nathaniel Hersey, a negro companion of prisoner, swears that the prisoner told him about a week before the murder, that he had found the persons who swore him into prison, and that he was going to kill them—that their name was Van Nest. Hersey told this the same night to Mr. Stephen Titus; also to John De Puy. The day the prisoner was brought to the jail, he told Ethan A. Warden that he killed the Van Nests because they swore him into prison. He told Aretus A. Sabin the same thing, the same day. And after the murder he rode into the widow Godfrey's yard, as he has frequently confessed; but there being lights there and being wounded, he made off. He was drunk that day and had drunk a pint of liquor the afternoon of the murder.

Is it difficult to believe, when we know he was thus maddened by liquor, filled with the belief that Van Nest had "swore him into prison," and bent on redress, that he

gave true answers to *Dr. Bigelow* and *Squire Bostwick* immediately on his arrest? They asked why he killed that family. To the former he said: "Well, to see if I couldn't get revenge, or get some pay for being in state's prison about a horse; and I didn't do it." And to the latter—"I couldn't get any satisfaction, and I meant to be revenged." Shakespeare, who knew the human heart as well as if he'd made it, paints a money-lending Jew, who, indignant at the insults and oppressions practiced on his caste, prefers the taking of human life to the re-payment of three thousand ducats. Shylock, when asked if he will take the pound of flesh, and what that's good for, says: "To bait fish withal: if it will feed nothing else, it will feed my revenge. He hath disgraced me. * * * * And what's his reason? I am a Jew. Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions? Fed with the same food—hurt with the same weapons—subject to the same diseases—healed by the same means—warmed and cooled by the same winter and summer as a Christian is? If you prick us, do we not bleed? If you tickle us, do we not laugh? If you poison us, do we not die? And, if you wrong us, shall we not revenge? If we are like you in the rest, we will resemble you in that. If a Jew wrong a Christian what is his humility? Revenge. If a Christian wrong a Jew, what should his sufferance be by Christian example? Why, Revenge." And again,

"You'll ask me, why I rather choose to have
 A weight of carrion flesh, than to receive
 Three thousand ducats: I'll not answer that:
 But say it is my humor; Is it answer'd?
 What if my house be troubled with a rat,
 And I be pleased to give ten thousand ducats
 To have it ban'd? What, are you answer'd yet?
 Some men there are, love not a gaping pig;
 Some, that are mad if they behold a cat;
 * * * * * Now for your answer:
 As there is no firm reason to be render'd
 Why he cannot abide a gaping pig;
 Why he cannot abide a necessary cat;

So can I give no reason, nor I will not;
More than a lodg'd hate, and a certain loathing
I bear Antonio, that I follow thus
A losing suit against him. Are you answer'd?"

This prisoner had a reason for slaughtering this family. His threat, preparation, lying in wait, selection of them, avoidance of others,—all indicate a fell purpose to destroy Van Nest. I believe his motive was revenge. It may have been plunder. He may have had confederates. This family was known to be rich—their residence retired. The blow given him by Mrs. Wyckoff caused his flight; and he had neither time nor strength to rob. It is of no earthly consequence, except to satisfy an idle curiosity, what his motive was. No adequate motive, of course, existed. The Rev. Dr. Austin thinks Freeman not sound, because he can "assign no motive adequate to a sound mind for the commission of this crime." Was there ever a murderer that could?

Henry Green was convicted in July of last year, of murder in Rensselaer county. He was a young man of good family and of property; and had married a lovely girl to whom he professed the most ardent attachment. He poisoned her with arsenic in pills which he had procured for her to relieve a slight indisposition. He put arsenic in her tea, coffee, toast—water, broth, soup, and everything she drank for forty-eight hours, till she died. This occurred within a week after the marriage. Not the slightest difference ever occurred between them. He was proved to have burst into tears when she began to manifest the effects of the poison—called on the neighbors and said he was afraid she was going to die, and went after a physician. He attended her sick bed until almost the moment of her death, when he fainted and was removed. Her suffering was so intense that she was with difficulty prevented from tearing open her throat and stomach; and yet this creature calmly and steadily mixed, in her medicine, her drink, her food, the arsenic which was burning her life out! We proved no malice—we could hardly conjecture any; yet he was con-

victed. He subsequently confessed that he committed the crime with the intention of marrying another woman of small property and no attractions. He was executed. Now, when such demons exist, how idle is it for a man of ordinary honesty or humanity to hunt after the motive of a criminal!

This prisoner is and always has been, driven by the slightest causes into bursts of ungovernable passion. As a boy he amused himself with stoning other boys. When larger he threw a flat-iron at Jefferson Wellington. In jail before he went to state prison, he fought and flogged another prisoner. In state prison he attacked a convict for moving his boots after they had been greased, and lamed him for a week; fought another about some yarn; assaulted the Keeper Tyler—struck him with his first, then made at him with a knife, and was with difficulty subdued. Just before the murder he threatened the life of John DePuy, who forbade people giving him rum; and in March last, the day after the murder, he had a severe fight with Amos, who arrested him, and said, as Amos swears, “if he had a knife he would gut me.” Such a temper as this, influenced by such trivial causes, animating its desperate and reckless possessor, requires but little inducement to the commission of any crime.

The motive of a criminal is important when there is no direct evidence that he has committed the crime. Circumstantial evidence is vastly strengthened by proof of a strong motive actuating the accused, and impelling him to the act with which he is sought to be charged. But where, as here, the testimony is direct and conclusive that the bloody deed was performed by the prisoner, his motive ceases to be material. It is not given to man to search the heart. Let that investigation be transferred to a Tribunal before which this prisoner must shortly appear. The illegal act being proved, the law declares the motive. That motive is malice—a wicked, depraved heart.

But Doctor Brigham testifies that the prisoner is insane;

and Doctors McCall, Coventry, Van Epps and Fosgate agree with him. They also give it as their opinion that the prisoner must have been insane on the twelfth of March; and that is the time, of course, to which you will direct your attention. The humanity of our statute allows no insane man to be tried. A preliminary inquiry has satisfied this Court that the prisoner is not insane; and he has been put upon trial. Should he hereafter become insane, the same statute provides that he shall not be sentenced or executed while in that condition. But the present inquiry is, was he insane on the twelfth of March?

If the prisoner was insane on the twelfth day of March, he must be acquitted; and the testimony of Doctor Brigham being most important, I shall call your attention to it particularly. Before doing so, however, allow me to say, that I feel, in common with the whole public, the obligations we are under to Dr. Brigham, for his unwearied efforts and extensive researches in the humane and benevolent mission of alleviating the unfortunate condition of those whom God has bereft of reason. The great good he has thus accomplished reflects credit on him, on the institution over which he presides, and on the state, and elevates the social condition of the age. I admire his intelligence in his profession, and his kindness of heart; and I feel happy to think that the acquaintance I have enjoyed with him for years might almost give me the right to claim him as a personal friend. But you and I see perfectly the difficulty with him as a witness on the stand. He is as profoundly ignorant of law as he is familiar with medicine. He is utterly unaccustomed to the prejudice, perversion and perjury of witnesses; and coming from the asylum with a conviction that Freeman must be insane because he does not assign, and the doctors cannot guess, an adequate motive for the crime, his only inquiry is, to which class of insane persons he shall assign the prisoner; and without stopping to reflect whether the prisoner or his witnesses may not lie, he notes down, as the trial proceeds, *here* a fact denoting

dementia, and *there* another indicating homicidal monomania; *now* something that looks like general mania, and *there* a suspicion of kleptomania; *occasional* symptoms of macho mania, and again strong manifestations of the lying mania. On such testimony he builds his theory. He will not sit still to hear a witness cross-examined. If the witness John De Puy (the brother-in-law of prisoner, whom I moved to have committed for glaring perjury on the stand, a motion yet undisposed of,) swears to Freeman's being up at night, dancing when he should have been asleep, Doctor Brigham makes a memorandum—"Restless nights—insanity;" and I can't get him to sit still till the cross-examination shows that the true entry should be "*Negro Frolic—Rum.*" He will not believe our witnesses because they do not see what he has pre-determined exists. He believes the prisoner's mother quicker than a disinterested witness. When asked if he relies on an unchaste black, he replies with charming ingenuousness, "I do believe Deborah." You can furnish him no proofs of sanity, for there is nothing he has not seen or heard of insane people doing. He is filled with vagaries of the insane—ignorant almost of the habits of the sane. With the nature of blacks he is peculiarly unfamiliar. He does not know whether they ever tan. He cannot tell whether illness makes them pale. He thinks Freeman ought to have fled faster; yet he cannot tell the distance a horse will ordinarily travel in a day. He considers the conduct of Freeman in the presence of the Magistrates Paine and Bostwick, evidence of insanity; yet he will not admit that the Magistrates themselves, who differ with him, are better judges than he, of what they saw and he did not. He thinks Freeman's asking for a summons was evidence of insanity; yet when I ask him what process he ought to have demanded, he answers—"I do not know. I do not know a summons from a subpoena. I am summoned here to testify!"

His (Doctor Brigham's) memory, too, is treacherous. He commenced his testimony by saying that he had been asked

by me what there was in the expression of an insane man which he could detect, and yet could not describe. He said, by way of illustration, that he had seen in court a man that he knew to be insane; and yet he could not tell how he knew it, or describe it. Mr. Seward asked him to point out the man, and he did so. We called the man inside the bar; suffered him to talk before you; and you saw that he was a maniac, with a wild, rolling eye and senseless discourse, that a child would discover to be insane. And the constable (Cannon) swears that he first pointed out this man to Dr. Brigham, as insane. This Doctor Brigham denies.

Let us now look at the grounds of his belief that the prisoner was insane on the twelfth of March. He never saw him till in June last, after the defence of insanity had been interposed. His belief, therefore, is founded on the evidence in the case, and his own examination since the first of June. His own examination he places little stress on, except as satisfying him that prisoner is *not feigning insanity*. We could have saved him the necessity of this. We admit that the prisoner does not feign insanity. He occasionally tells abominable falsehoods—such as his assertion to Amos, the day after the murder, when trying to sell the horse he stole and ran away with. Amos asked where he got the horse, which you recollect was Burrington's. He replied, "he had a horse given him and had traded round till he got this one." Equally false were his statements to the Rev. Mr. Austin, that he never heard of Wyatt—never knew he had committed murder—never heard of his trial—did not know what his defense was—what the result was—was not present, &c.

Wyatt was tried in March for murder. The defense was insanity. The jury disagreed; and the prisoner was present, an apparent listener, during much of the trial. It is impossible, recollecting as he does, and repeating the minutest circumstances of his entire life, that he can have forgotten this; and yet the Rev. Mr. Austin, to whom he denied all knowledge of Wyatt, swears, "I have no idea that he did

lie. His evident candor and frankness convinced me that he was not lying." His denials, too, of knowing Van Nest, are false. He visited Van Nest's house the Monday but one before the murder, and asked Van Nest to hire him. He entered the back door. He had acquired a familiarity with the premises by living on them some years before. These, therefore, are gross falsehoods, but they do not indicate that he feigns insanity.

Doctor Brigham then proceeds to give his views of the testimony given in the case; and here let me say that if you differ with him as to what has been proved, his opinion falls to the ground. It is based on what he considers the evidence in the case. If the base fails, the superstructure must fall; and this is precisely the point in which, as I have already said, the difficulty lies with Doctor Brigham's testimony. Let us begin by looking at his ideas of responsibility. He says, if I should take this knife and kill one of you, and sit down, he would swear I was insane. So if I should shoot into the jury box and kill a half dozen jurors, if that was all that appeared, he would swear I was insane.

If a witness swear against me in a civil suit for a large amount, and I should kill him, Dr. Brigham swears he would think me sane; but if for a small amount, he should think me insane.

Now, gentlemen, upon such a state of facts as either of these, the law says I am a murderer; and you will readily see that the safety of society consists in upholding this law. To make the crime itself and *alone* proof of insanity, is to extend entire immunity to men of standing who choose to turn criminals. He applies the same rule to theft, malicious and wanton injuries, and other crimes. Doctor Brigham does not seem to have the remotest idea of the frightful jeopardy in which his notions and his evidence place the property and the life of the citizen. And when I look at his artless countenance, and hear the mild, amiable and gentle tones of his voice, while he is innocently dealing

with doctrines that may convulse society to its centre, he reminds me more of a child playing with lightning, than a scholar and philanthropist bringing the lights of science to aid the investigation and establishment of truth.

But what are the facts that Dr. Brigham considers proved? He thinks insanity existed in the prisoner's ancestors. In this he errs. The prisoner's father drank himself to death. His mother is part Indian, and is, and always was intemperate. True, the black man, David Winner, testifies that his aunt, Jane Brown, and his sister are crazy. The prisoner's brother-in-law, De Puy, confirms this as to Jane Brown. But Doctor Bigelow tells you he never heard that Jane Brown was crazy till the commencement of this trial; he never saw anything to indicate insanity in her except *ordinary intoxication*; and prisoner's mother swears—"I have three children; had five; but none of them are crazy but this one." The prisoner's uncle, Sidney Freeman, is insane. You will thus see that intemperance is infinitely more the disease of his ancestors than insanity.

Doctor Brigham's next important fact is an assumed change in the prisoner's temper and character. He truly says: "So common is this change of character in insanity, that many regard it as necessary to the definition of the term. A prolonged change of character, without any evident external cause, is given in many works on insanity as a characteristic; and the cases are almost innumerable where such changes have come within my own observation." To the truth of this I heartily subscribe. It conforms to the general observation of mankind. It is as good a definition of insanity as need be given.

Has any change taken place in the prisoner without external cause?

We have his history from childhood. He was born and brought up in Auburn. He was 21 years old last September. He has grown to be a man in size. He was a mischievous boy; and, utterly uncared for and unrestrained, he naturally ends by being a criminal man. He ran away

from Warden; he ran away from Lynch; he never lived any considerable time in one place. He was always violent, and vicious in his temper. I have already referred you to his continual fighting from childhood. He was always profane. Before he went to state prison, Vanderheyden pursued him, and overtook him on a canal boat; told him he had two warrants for him; and the prisoner replied: "It is a d——d lie—you have no warrant for me." In state prison, Van Keuren threatened to report him. He replied: "report and be-d——d." When Amos arrested him after the murder, he was equally profane, threatening to rip him open if he had a knife. In this, then, there is no change.

He was always extremely covetous and close in making bargains. He insisted that Lynch should pay him five shillings a day for work, instead of four. He sawed wood for Conklin, and insisted upon three shillings instead of two. He claimed more from Murfey than he was willing to pay; and tried to get a summons from the Justices against him. He offered Morris two shillings for a knife, the price of which was four; then offered him four for a knife and handle. Hyatt sold him a knife for one shilling, the price of which was two. He beat Hyatt down on the price of a rivet from six pence to three pence. In this, then, there is no change.

In his physical appearance there is no change except growth, increased deafness and, possibly, the difference in sprightliness and frankness that you would expect to find between an unconcerned child, and a discharged state prison convict.

The people who have known the prisoner nearly his entire life and have the best opportunities of judging, swear there is no other change than I have described. The smile on which Dr. Brigham lays such weight, the prisoner always had; so had his father, and his grandfather, as these witnesses show. It does not prove insanity, but it does prove how true it is that a man may

"Smile and smile and be a villain."

How are you to find the fact of a *change*, in the face of all this evidence? Will you believe John De Puy? Even Dr. Brigham puts diminished trust in him. He is contradicted in every important fact he swears to. He says Freeman could once read. Hotchkiss says he never could. He swears he never saw the prisoner drink spirits. The evidence is abundant that he again and again forbade people giving him liquor. He swears that he noticed nothing the day he was removed from prison, and acted like a fool; describes his buying a cap, and mistaking quarter dollars for halves; sitting on a pile of boards, and people asking De Puy "what d——d fool that was who was sitting there?" Yet the chaplain of the prison proves to you that the day he left the prison, he appeared to feel well; made some music and fun; said when asked to sign the usual receipt for three dollars given prisoners on their discharge, that he had been imprisoned unjustly and wasn't going to settle so; when told unless he signed it he couldn't have the money, said he couldn't write; was told to make his mark, which he did, and received the money. Do not forget that the idea of being entitled to pay in the prison is a common one among the convicts, as you have heard.

What does honest Aaron Demun, the prisoner's uncle, say of his appearance on the day spoken of by De Puy? He saw the prisoner the day he came out of prison on the "opposite side of the street;" prisoner said, "Uncle Aaron, how d'ye do?" Demun asked how he did. Prisoner replied, "Pretty hearty." Did not seem deaf. Is it not obvious, then, that De Puy perjures himself? He swears to prisoner's running back and forth in the streets of Auburn, in the day time, without reason. Not a citizen of Auburn confirms this! He contradicts himself. He swears that prisoner, after coming out of prison, only answered questions, and never commenced conversation; yet he details an animated description, an hour long, given by prisoner of a fight with Hoskins, and another of half an hour with Tyler. He states that prisoner had a knapsack on

his back in prison and was crazy there. No one of the keepers confirms this, or ever saw it. He swears that prisoner is now crazy, and has been for years. He denies that he said, since prisoner was arrested, that he was not crazy—only ugly when drunk. Yet Stephen S. Austin, a perfectly respectable man, swears, that after the story got round that Freeman was crazy, he asked De Puy about it, and he replied, “No! he is no more crazy than you or I, except when he is drunk. Then he’s an ugly little devil, and I was always afraid of him.” Munroe swears De Puy told him prisoner was not crazy. He told others the same thing. Under these circumstances I felt it my duty to ask the court to commit him for gross and wilful perjury upon the stand, and I call upon you totally to disregard his worthless testimony.

Where, then, will you look for evidence of change? To Deborah De Puy? She gives no facts, and she either has no memory or no character. If she swears she has a husband and cannot remember where she was married, when she was married, whether she had a large wedding, or who married her, what reliance can you place upon her description of a change in Freeman? Or, will you hear Sally Freeman? The prisoner did not live with her for five years before he went to prison. She did not see him the whole five years he was in prison; has seen him half a dozen times since; did not see him for two months before the murder; visited him in jail and asked him what made him commit the murders; he made no reply. She gives no facts, and testifies with all the *inducements* to swerve from truth, perhaps, I might say the *obligation*, that hangs over a mother testifying for a son’s life. Or, can you gather the change from Ethan A. Warden’s testimony? The prisoner lived with Warden as a lad; played with his children; ran away when he was sent of errands. Mr. Warden swears he was not discharged, but was sent of an errand, and never came back. He has been, then, on Mr. Warden’s errand ever since!

Mr. Warden has been extremely active in preparing this defense; in procuring witnesses; assisting counsel; qualifying himself to testify, and testifying. It is infinitely to be regretted that his curiosity as to the state of Freeman's mind, and the extent of his mental and moral culture, should not have been awakened earlier. If Mr. Warden had examined the boy who lived with him on religious subjects, and had given him a fair education, he might, at least, have been able to tell us what Freeman knew *then* that he has forgotten *now*, even if he might not, perchance, have arrested the catastrophe we are investigating. Where have Mr. Warden's kind feelings for this boy slumbered during the last fourteen years? Has he employed Freeman when he was hunting around Auburn for work? Has he inquired after his welfare? Has he ever spoken to him in the streets? Once, indeed, he saw Freeman in state prison. His counsel say he was imprisoned wrongfully. Mr. Warden found in prison the boy who had lived with him—the playmate of his children. Did he inquire how he came there? Whether he was guilty? How he behaved? When he was to come out? What could be done for him? No: he observed a change, and truly there was one. It was a great change from the *fat* of Mr. Warden's kitchen, to the leanness of a state prison; from the *frolic* of childhood, to the responsibility of manhood; from *sporting* with Mr. Warden's children, to *hard labor* and a *convict's cell*! Mr. Warden observed this change, and although he made no inquiry as to the cause, or effort to remedy it, he swears "*he thought to himself what's come over Bill?*" Why, Mr. Warden might have remembered all the causes for change I have described, and he ought to have recollected *that the law had come over Bill*; that he was a felon in prison at hard labor, not a truant boy frolicking with Mr. Warden's children, and having the run of his kitchen. And if Mr. Warden had sympathy to spare, then, and when Freeman was discharged from prison, were the occasions to procure him employment, restore him to usefulness and happiness. But he has waited

till this man, driven to desperation, has committed a crime, the thought of which almost freezes one's heart, and he stands (if I may so speak,) at the very foot of the scaffold! Thus, Mr. Warden's horror of capital punishment, and peculiar views in other respects, impel him to exertions to rescue this man from the law, the hundredth part of which, employed a few months ago, would have made the prisoner a useful citizen, and saved an estimable family from butchery. But Mr. Warden's testimony shows no change except what is natural under the circumstances; and the testimony against any change is overwhelming.

Has the prisoner changed his habits? This is one of the strongest tests in the books of homicidal monomania. It is the test Dr. Brigham applies to me. Let us try the prisoner by it. Vanderheyden swears that he has had process several times for the prisoner, for petit larceny, before he was sent to the state prison, and when he must have been about fifteen or sixteen years of age. He broke open a pedler's cart, and was arrested for it. He then stole hens, and was arrested. He was found at John De Puy's under the bed. He escaped from the constable after he was arrested; was pursued and found on a canal boat with a bottle in his pocket, as I have already stated. He was arrested then for stealing Mrs. Godfrey's horse, and discharged for want of proof. He was again arrested; committed to jail; broke the lock of the jail; let himself out and another prisoner; was pursued, overtaken, brought back, tried, convicted, and served five years in the state prison at Auburn. It is suggested that he was innocent of the last offence. The evidence in this case leads to no such conclusion. Vanderheyden has that impression; but it is incredible that this man could be tried here in Auburn, where he was born and brought up; sent to the state prison in this place where he, even now, has such warm friends, and stay there five years, an innocent man. He stands before you as a man legally convicted of that offence. Judge Richardson, before whom he was tried, is a witness in this case, called by the defense, and proves his

conviction. No question was asked him as to previous innocence; nor did the defense venture to ask such a question of either of the witnesses we have called; *i. e.* Meyers, the District Attorney, who tried him; Markham, one of the jurors; or Andrus, the counsel who defended him. The point is not essential or material to this case; but I have no doubt he was guilty of the offence for which he was sent to prison. He assisted another black, known as Jack Furman, or Willard, in stealing Mrs. Godfrey's horse. He stole Mrs. Wyckoff's horse the night of the murder; this being worthless, he stole Burrington's, and tried to sell it to Amos, Corning and others. There is no change here, then. His habits are unchanged. He lied in early life; he lies now. He swore before; he swears now. He fought before; he fights now. He stole before; he steals now. He attempted to kill Tyler in the prison; he kills the Van Nests now. There is no change in him, except that his depravity hardens with years. What other indications does Dr. Brigham find in the case? Sleepless nights; but there is no proof of this. Of De Puy I have already spoken. From De Puy's the prisoner went to Adam Gray's. Adam Gray's testimony indicates that the excitement of prisoner was caused by liquor, although he never saw him drunk but once. Mary 'Ann Newark, with whom prisoner lived at the time of the murder, knew nothing of his being up nights. There is, then, no proof, of sleepless nights within a month of the time of the murder. Taylor swears that he slept well the night after; and the jailer swears that his rest has never been broken, so far as he knows, for the four months he has been in jail, except one night when he forgot to give him his bedding. Then he rattled his chains and knocked against the wall till it came.

Doctor Brigham thinks there would be a calm after the homicide. He thinks he now has dementia; but there would hardly be an uninterrupted tranquility in an insane man's rest for five months, beginning a month before the murder, and continuing all through the tragedy and the trial! You

will not find, therefore, in the evidence, the sleepless nights on which Dr. Brigham relies. He thinks the testimony shows the prisoner's pulse irregular, but it does not. Dr. Bigelow swears that at the commencement of a long conversation his pulse was at seventy-seven; afterwards, while standing, eighty-one; when about leaving him, eighty-six. Dr. Spencer swears "the prisoner has slept well, eat well, and is in good physical health generally." There is no derangement of the pulse proved; so far from it, the prisoner has a perfectly healthy pulse, except when terrified by threats or fear of punishment. Not one of the physicians who examined him attached importance to his pulse, as indicating insanity; so far from it, the testimony of all of them shows that the prisoner's physical health is perfect.

Doctor Brigham thinks the external appearance of the prisoner satisfy himself of the motive for this murder. On this I have already commented. He thinks the testimony shows that the prisoner never asks questions. Why, the testimony shows that he continually does! He asked De Puy for Jack Willard; he asked Bostwick for a warrant, and again for a summons; he asked Paine for a warrant; he asked Austin if he had wood to saw; he asked his uncle Demun how he liked his place, and whether he was at work steady; inquired of Simpson, Hyatt and Morris for knives. If this is proof of sanity, at or about the time of the commission of the offense he asked questions enough. Since he has been in jail, he has been continually occupied in *answering* questions.

Doctor Brigham thinks the external appearance of the prisoner, here in Court, indicates insanity. I appeal to you if this is so. You have seen insane persons. You saw the man whom Doctor Brigham pointed out in Court. I will read to you from Esquirol the physical symptoms of dementia, which Doctor Brigham says is the insanity of this prisoner. I cite Esquirol because Dr. Brigham says he is high authority. Guy, Ray, Pritchard and other writers, agree with him. Esquirol says: "The face is pale, the eyes dull, and moistened with tears, the look uncertain, and the physiognomy

without expression." Of their habits, he says: "Almost all have some sort of ridiculous habit or passion. Some are constantly walking about as if seeking something they do not find. The gait of others is slow, and they walk with difficulty. Others, still, pass days, months and years, located in the same place, drawn up in bed or extended upon the ground. One, in an interminable babble, speaks in a loud voice, constantly repeating the same words; another, with a sort of continued murmur, utters, in a very low tone, certain imperfectly articulated sounds—commencing a phrase without being able to finish it. The latter does not speak, while the former beats with his hands both night and day; his neighbor at the same time balancing his body in the same direction, with a degree of monotony very fatiguing, even to an observer. One murmurs, rejoices, weeps and laughs at the same time; another sings, whistles and dances during the whole day. Many clothe themselves in a ridiculous manner," &c. In speaking of their intellects, he says their sensations are feeble; cannot recall impressions recently made; cannot fix their attention; are consequently incoherent and disconnected in conversation and narration.

Now, has Freeman one of these symptoms, intellectual or physical? Has he not sat here for four weeks without a single grotesque or unnatural movement? The smile so often adverted to, he always had; so had his father and grandfather. You have had opportunities for observing it for two entire weeks, and will determine whether it indicates anything—and what. Aside from this, is there a single feature or movement about him indicating imbecility or insanity? Did you ever see a sharper, brighter eye, or one more fixed and resolute? Did you ever notice an unnatural movement in him? Ever observe him for an instant appear to be talking to himself? Ever detect the slightest movement of his lips, or the least wandering in his eye? I have not. Does he ever laugh? I have not heard him. Is not his memory remarkably retentive? Does he not detail to Lynch the minutest circumstances of his early as

well as his later life? Does he not narrate to Wood all the circumstances of his imprisonment, escape, flight and capture? Does he not remember perfectly where he worked in prison, what at, and under whom? What did he ever know that he has forgotten? Is not his attention perfect? Does he ever wander from one subject to another, or betray the least incoherence? I can find no evidence of it. If I were asked to name the disease he certainly has not, I should name dementia.

I have thus gone through, in detail with all the circumstances of any moment on which Dr. Brigham founds his belief of the prisoner's insanity. He has also favored us with an elaborate explanation of the facts on which we rely to establish his sanity—such as *preparation, design, concealment, memory, flight*; these can as well be considered by you as by him.

It is doubtless true, that there is no one thing a sane man does, that Dr. Brigham has not heard of some insane man doing; but it will be for you to inquire, presently, whether all these evidences of sanity can possibly combine in the case of the same insane man. Meantime, I ask you whether the testimony does not overwhelmingly contradict all the facts on which Doctor Brigham's theory of insanity rests? Were the prisoner's ancestors insane? Has his character, habits or appearance changed without external cause? Had he sleepless nights at the time of the murder, or at any time, from disease? Is it proved that he could have had no motive for the murders? Is his pulse irregular? Does he ask no questions? Does his external appearance indicate dementia? I submit to you that the reverse of all this is true; and if so, the theory constructed on these false facts must fall.

Doctors McCall and Coventry reside in the same town with Dr. Brigham. The latter is a trustee of the same asylum, and both claim to derive most of their experience from observation in that institution. They naturally agree with Dr. Brigham; Dr. McCall is, in addition, a phrenolo-

gist, and says he can judge by Freeman's external appearance that he is insane, and what the character of his insanity is. He thinks prisoner has cleptomania, which is an irresistible propensity to steal. He thinks the smallness of his head denotes insanity; yet it is as large as Dr. Brigham's or mine. He thinks he leans too much forward; yet that is the way a deaf man tries to hear. He thinks the holding of his arms awkward; yet he seems to forget that prisoner has been wounded in both arms. In one respect, Doctors Brigham and McCall differ; both agree that insanity is a disease. Dr. Brigham thinks it in some forms contagious; Dr. McCall thinks it not strictly contagious, but at times epidemic. He says it appears epidemic on the coming of warm weather. Dr. B. is sorry to hear of cases of homicidal monomania, for fear it will induce others to imitate it. In that way he thinks it may be called contagious! Contagious by imitation! This is indeed a peculiar disease! I can imagine *crime* being contagious by imitation, but that *disease* should be thus contagious, seems to me singular. I do not think it is true of any other disease but insanity. At all events, I cannot realize that I should ever begin to shake, from seeing another man with the fever and ague! There is a breadth and brilliancy in these theories that reach far beyond the institution from which they emanate; and the professors may well think that

"No pent up *Utica* contracts our powers,
The wide—the boundless continent is ours."

Dr. McCall thinks that the prisoner's insane delusion was that he was wrongfully imprisoned and was entitled to pay. He thinks the insane impulse under which the prisoner committed the murders, was in some degree manifested in prison, in the attack upon the convict and the officer. Now, this delusion is certainly epidemic in the prison, as the testimony shows; and if the violence and the homicide which it provokes, in the prison and out, should become contagious, this community would be afflicted with a more fatal pesti-

lence than Asiatic cholera or the plague. It seems to me, under these circumstances, that public safety calls for a severe treatment of the early cases.

The Reverend John M. Austin has satisfied himself that the prisoner's mind "is in a shattered or unsound state, though he can give no technical name to the difficulty." Mr. Austin is the pastor of the Universalist Church in this village. He is opposed, as he swears, to hanging anyone, and cannot think it right to take the life of another. He has written for religious and political papers in regard to this case; employed counsel; taken a trustee of his church (Mr. Curtis) to the jail, preparatory to his being a witness; gone there with other witnesses; talked of the case a hundred times; and gives us his own views on the stand. He swears he is "quite confident that a sane man twenty-three years old, who cannot read, but thinks he can—who cannot count more than twenty-seven or eight, but thinks he can, cannot be found in this county." He therefore thinks prisoner insane. What does Dr. Bigelow testify to? He says, "I have known men in prison over twenty-three years old, who could not multiply two by four, and who could not read. I have seen both white and colored men in that condition." And you heard his accounts of the negro Madison and the white man Miller.

Now, Mr. Austin must see how very easy it is for him to be mistaken. Madison certainly thinks he can count. He counts thirty, which is two or three more than Freeman. From that he counts by tens to ninety, then sixty, forty, forty-one, forty-two, forty-three, forty-five, forty-seven, forty-eight, forty-nine. Beyond this he says he couldn't make it out. On a second trial, he starts at ninety, which seems to be his maximum, and continues thus: "thirty, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, forty, fifty, sixty;" and he adds, "that's as far as I went the first time; I can't go no further." But on due reflection, he continues: "Stop, I can go one more—sixty, sixty-one, sixty-two, sixty-

five, sixty-seven; there, I won't count any more. *That's as far as I went the first time, and I made a balk!*" Again, Miller says he can read; he repeats all the letters of the alphabet correctly, and he reads, in entire sincerity, the following sentence: "The old Romans used to write in the Latin language." He renders it thus—"Old man seat church in tin Jesus!" He counts to forty-five, and by his addition makes nine and nine nineteen, six and five fifteen, seven and eight eighteen! Madison is twenty-three, and Miller twenty-nine. A little attention to their exhibitions would show Dr. Austin the difference between ignorance and insanity.

But there are other peculiarities in Mr. Austin's testimony. Freeman told him that "if they would let him go this time, he would try to do better." This is the very essence of legal sanity—the very test of responsibility that the law imposes—a consciousness that he had voluntarily done wrong; and yet to Mr. Austin it showed "an entire want of rational appreciation of the nature and enormity of his deeds, and an entire ignorance of the consequences of his act!"—in other words, it showed insanity. Did Mr. Austin think him insane in jail? He swears he prayed with him; and I can hardly believe that he would pray with an insane man. Pray for him he might and ought, but I hardly think he would pray with him. His examinations of the prisoner have been most singular. In regard to the fundamental principles of religion he never questioned him. These, he says, he supposed he knew, and yet these would seem to be the precise subjects of Christian inquiry, and instruction in these, all important to the prisoner's salvation. Neither Mr. Austin nor any other witness ever attempted to set Freeman right as to a single notion he entertained, which might influence his future conduct. So far from it, efforts were continually made to lead him from one folly or absurdity to another. When Hopkins understood him to say he had seen Jesus Christ in Sunday School, instead of correcting or reproving this unhappy creature

on the brink of destruction, Hopkins asked him whether Jesus Christ took a class, and whether he preached or talked! Dr. Austin gave him a Testament, and he is the first man who is proved to have witnessed the prisoner's peculiar manner of reading. Has he tried to correct him? Has any body attempted to teach him to read? Witness upon witness has been taken to the jail to see the prisoner run his fingers along the sacred pages and repeat the words, "O Lord—Jesus Christ—Mercy—Moses," which were not on the pages, and yet Dr. Austin, instead of stopping this mummery, furnished the Testament, first witnessed the performance, and has again and again superintended it since! If the Rev. Mr. Austin knew the natural disposition of the negro as well as I do, and his clerical duty as well as I hope he does, he would have taken Freeman a jewsharp, instead of a Testament, to play on!

Under Mr. Austin's tuition, his weak and credulous trustee, (Mr. Curtis,) came to the conclusion that Freeman "knows no more of the moral character of an act than a dog or a cat;" that he is "part fool, bordering on idiocy—idiotic and crazy." Some of the time he thought "he was foolish; sometimes that he was crazy; sometimes a little of both." "Part fool, bordering on idiocy—crazy and an idiot;" and he sums up his complicated derangement by swearing that he is both *crazy and insane!* True, once he suspected prisoner was deceiving him, but on appealing to Mr. Austin, who was present, explaining the symptoms, the suspicion vanished; yet he had the strongest evidence that prisoner was deceiving him, for when he asked prisoner what he killed the family for, prisoner said: "You know I had my work to do." Curtis told him *that was nonsense, and repeated the question loud and distinct.* Freeman then answered: "*I don't know.*" Why was Mr. Curtis selected to witness this exhibition and testify to it? He certainly was not the most intelligent member of Dr. Austin's congregation. He is undoubtedly honest, however, and thus describes prisoner who lived with

him in 1840, before he went to prison: "His disposition was not good; he was stubborn and stupid. He was of no use to me. If I sent him away five rods, he would be just as likely to bring the wrong thing as the right one. He was a dull, morose and stubborn boy; and if he had any capacity I could not discover it." Certainly, this does not prove the change on which Dr. Brigham relies. But you have the facts which Dr. Austin and Mr. Curtis testify to, and you will say how far they sustain their theories, and how much they may be relied on.

There is one extraordinary fact in this case that will not escape you—there is but one white witness who ever suspected Freeman of insanity before the murder! In this community, where he was born and brought up, and where such a thorough search has been made for testimony, there is but a single witness on whom you will place any sort of reliance, that swears he suspected prisoner of insanity before the murder. And this witness is Levi Hermance, who conversed with the prisoner in the month of December, twice, for five minutes each time! The effect of this testimony I must leave to you without comment. True, neither Mrs. Godfrey, Esquires Paine and Bostwick, Messrs. Warden, Smith and Briggs, nor any of the other witnesses for the prisoner, detected any insanity. But there is an extent and variety about the acquirements of Mr. Hermance, before which their gifts

"Pale their ineffectual fires."

I bow with reverence, lay my hand upon my mouth and my mouth in the dust when I find myself confronted by one who swears to us that he has practiced Allopathy and Homœopathy, but is esteemed a Thompsonian practitioner; has worked on a farm; been an agent in a woolen factory; taught school; sold goods at auction; is an attorney of the Common Pleas, and a turnkey in the state prison! Whatever conclusion you may come to in regard to the *prisoner*, you will readily see that this *witness* has no monomania.

Let us now turn to the medical witnesses for the prosecu-

tion. Doctors Darrow, Hyde, Gilmore, Clary, Dimon, Willard, Bigelow, Spencer, swear that they have examined the prisoner repeatedly, to ascertain whether he was insane; and they unanimously conclude that he is sane.

In view of this mass of testimony, coming from those to whom you daily confide your own health and life, and those of your families, if this were a mere question of medicine, would you not be forced to conclude that this prisoner is sane? But there is one physician whose name occurs often in the testimony, who invited Dr. Bigelow and others to visit the prisoner; who frequently visited him himself, and who is proved to be an eminent physician and surgeon. Where is he? Where is Dr. Pitney? Mr. Seward sent him to the jail to examine the prisoner; why is he not called upon the stand by the defense? Or when called by us, why was he not cross-examined as to prisoner's sanity? Why send to Utica and Albany for physicians, who never before saw the prisoner, and neglect to call an eminent surgeon here, who examined him repeatedly at the request of prisoner's counsel, and knew him before? Why resort to the foreign scientific market, when the domestic furnishes an abundant supply? We may be told that Dr. Pitney is the father-in-law of one of prisoners' counsel, and that motives of delicacy have prevented his being called. But two of the prisoner's counsel themselves made affidavits in this case for a continuance. Their clerk has been sworn. Warren T. Worden, who assists the defense as witness, trior and counsel, has not only testified as to the past, but prophesied as to the future. In his judgment, the prisoner "would laugh upon the gallows as readily and freely as he did in his cell; he would probably know as much as a dumb beast, that was taken to the slaughter house, as to what was to be done with him!" In the cell, you remember Dr. Briggs testifies that the prisoner laughed when the phrenologist felt Warren T. Worden's bumps, and so did Dr. Briggs and Worden. It is not this delicacy, therefore, that keeps Dr. Pitney from the stand. When a client's life is at stake, such delicacy

must give way. Again, I ask, where is Dr. Pitney? The absence of one statue at a Roman funeral caused more remark than the presence of all others; so you, in missing Dr. Pitney from this galaxy of medical science, will be forced to conclude that he has satisfied himself that Freeman is sane.

If prisoner was insane on the twelfth of March, what species of insanity had he?

I have endeavored to show that he has not dementia now. He is not an idiot. Idiocy is not insanity. Dr. Brigham does not so consider it. Esquirol does not so consider it. Coke does not so consider it. Insanity is a derangement of the faculties—Idiocy is a defect of them. Idiocy is connate—Insanity acquired. Insanity is a change—Idiocy is the absence of change. Idiocy is written upon the external structure of the man—Insanity affects only his expression. The idiot is free from disease—the insane man is not. The evidence in this case rebuts all idea of idiocy. Dr. Brigham even finds no indication of it. He says the prisoner had, on the twelfth of March, homicidal monomania. This Dr. Brigham terms a disease—a disease which is sometimes preceded by no symptoms. It is a sudden impulse to kill, and the unaccountable killing is the first symptom of the disease. This he illustrates by my rising and stabbing one of the jurors. In me, this would be (he thinks) homicidal monomania. Now, Mr. Christian (one of the jurors,) ignorant as you and I may be of medicine, the symptoms of this disease we can appreciate—it is a knife thrust in the heart! It concerns us to understand fully this disease, and Dr. Brigham will therefore excuse us for looking to other authorities for the definition of it.

The prisoner is proved incontestibly to have been, for the past two years, *in perfect physical health*, except that he had an earache in January, 1844 or 1845, and was costive in June or July following, for which Dr. Bigelow prescribed. With this exception, he has eat well, slept well. His bowels are regular; so is his pulse, ordinarily; and his countenance indicates perfect health, although his color is not as dark

as when habitually exposed to the sun and air. He carefully prepared weapons for this murder. He concealed them. The night previous he was at a ball. He performed his usual labor at home the fatal evening. He went to the house of Van Nest in the night, and lay in wait. He entered; slaughtered the family; stole two horses; fled; fought when arrested; denied all knowledge of the murder; and his past life, for the last six years, has been a scene of intemperance, profanity and crime. Yet Dr. Brigham thinks this a case of homicidal monomania! Now, I do not stop to inquire whether it would be ever safe to allow the crime alone to be received as proof of insanity. It is true that several eminent medical men say that insanity may exist without any derangement of the intellect. The theory was first broached by Pinel, who terms this species of insanity *Manie sans delire*, or, as some authors translate it, the *Reasoning Mania*. It is accompanied with little or no apparent intellectual derangement, and consists of a derangement of the affections and passions by disease, which subverts the will. Esquirol, who at first rejected the theory, subsequently adopted it; and other medical writers of high authority now agree with Esquirol. By Pritchard it is termed moral insanity; by Ray partial moral mania; and Dr. Dimon, one of the most intelligent medical men sworn by us, testifies, that he believes such a disease may exist. Let us then refer to eminent medical writers to see what this disease is.

Esquirol, in his treatise on Insanity, at page 362, says:

"We have classed among maniacs, persons who appear to enjoy the use of their reason, and whose affective functions alone seem to be in the wrong. These maniacs perceive, compare and judge correctly; but they are drawn aside from the slightest cause, and even without an object, to the commission of acts of violence and fury. They are *irresistibly* impelled, they assure us, to lacerate and injure themselves and destroy their fellow beings. These wretched persons have a consciousness of their condition; deplore their situation; warn their friends to protect themselves against their fury, or place them where they can do no harm. Pinel, more than any other physician, has called the attention of observers to this fearful malady, which in hospitals they call *reasoning insanity*, and to which our illustrious master has given the appellation

of *mania without delirium*. Fodere admits this variety, which he calls *maniacal fury*. But does a form of mania really exist, in which those who are affected by it preserve the integrity of their reason, whilst they abandon themselves to the commission of acts the most reprehensible? Is that a pathological condition in which man is irresistibly led on to the commission of an act which his conscience condemns? I think it is." "Homicidal monomania spares no age, since children from eight to ten years old are not exempt from it. It is ordinarily periodical, and the paroxysm or attack is preceded by symptoms which indicate a general excitement. This class of patients experience colic pains and a sensation of heat in the bowels and chest, attended with pain in the head. They suffer from insomnia; the face becomes red or very pale, the skin swarthy, the pulse hard and full, and the body affected with convulsive tremors. The patient usually makes an assault, when no external occurrence gives rise to the excess to which he yields himself. The act accomplished, it seems that the attack is over; and some homicidal monomaniacs seem to be relieved of a state of agitation and anguish, which was exceedingly painful to them. They are composed, and free from regret, remorse or fear. They contemplate their victim with indifference, and some even experience and manifest a kind of satisfaction. The greater part, far from flying, remain near the dead body, or concur with the magistrate by denouncing the act which they have just committed. A small number, however, retire, conceal the instrument and hide the traces of the murder. But very soon they betray themselves, or, if not seized by the police, hasten to reveal the act; to relate its most minute details, as well as the motives of their flight."

Ray, in his treatise on the Medical Jurisprudence of Insanity, speaking of cases of moral mania, says:

"In nearly all, the criminal act has been preceded either by some well-marked disturbance of the health, originating in the head, digestive system, or uterus, or by an irritable, gloomy, dejected or melancholy state; in short, by many of the symptoms of the incubation of mania. The absence of particulars, in some of the cases we find recorded, leaves us in doubt how general this change really is; but a careful examination would no doubt often, if not always, show its existence where *apparently* it has never taken place." On page 226, the same author says: "The criminal lays plans for the execution of his designs; time, place and weapons are all suited to his purpose; and when successful, he either flies from the scene of his enormities, or makes every effort to avoid discovery. The homicidal monomaniac, on the contrary, for the most part, consults none of the usual conveniences of crime. He falls upon the object of his fury, oftentimes, without the most proper means for accomplishing his purpose, and perhaps in the presence of a multitude, as if expressly to court observation; and then voluntarily

surrenders himself to the constituted authorities. When, as is sometimes the case, he does prepare the means, and calmly and deliberately executes his project, his subsequent conduct is still the same as in the former instance.

"The criminal often has accomplices, and generally vicious associates; the homicidal monomaniac has neither. The acts of homicidal insanity, are generally, perhaps always, preceded by some striking peculiarities in the conduct or character of the individual, strongly contrasting with his natural manifestations; while those of the criminal, are in correspondence with the tenor of his past history or character. In homicidal insanity, a man murders his wife, children or others to whom he is tenderly attached; this, the criminal never does, unless to gratify some evil passion, or gain some selfish end, too obvious to be overlooked on the slightest investigation."

"That beings in human shape have lived who delighted in the shedding of blood, and found a pastime in beholding the dying agonies of their victims, is a melancholy fact, too well established by the Neros and Caligulas of history. For such, we have no disposition to urge the plea of insanity, for though we are willing to believe them to have been unhappily constituted, we have no evidence that they labored under cerebral disease, and they certainly exhibited none of its phenomena. Motives the very slightest, no doubt, generally existed for even their most horrid atrocities; and even when they were entirely wanting, there was still a conformity of their bloody deeds with the whole tenor of their natural characters. They followed the bent of their dispositions, as manifested from childhood, glorying in their pre-eminent wickedness, and rendered familiar by habit with crime; and though conscience might have slumbered, or opposed but a feeble resistance to the force of their passions, yet it was not prevented by diseased action, so as to be blind to moral distinctions. In homicidal insanity, on the contrary, every thing is different. The criminal act for which its subject is called to an account, is the result of a strong, and perhaps sudden impulse, opposed to his natural habits, and generally preceded or followed by some derangement of the healthy actions of the brain or other organs. The Advocate General himself represented Papavoine 'as having been noted for his unsocial disposition; for avoiding his fellow laborers; for walking in retired, solitary places, appearing to be much absorbed in the vapors of a black melancholy.'

"This is not a picture of those human fiends to whom he would assimilate Papavoine, but it is a faithful one, of a mind over which the clouds of insanity are beginning to gather. Where is the similarity between this man, who, with a character for probity, and in a fit of melancholy, is irresistibly hurried to the commission of a horrible deed, and those wretches, who, hardened by a life of crime, commit their enormities with a perfect deliberation and consciousness of their nature?"

Pritchard, in his Treatise on Insanity, page 277, says:

"A case is cited by Pinel, of *instinctive fury*, in which the patient experienced at first a sensation of burning heat in the bowels, with an intense thirst and obstinate constipation. This sense of heat spread, by degrees, over the breast, neck and face, with a bright color; sometimes it became more intense, and produced violent and frequent pulsations in the arteries of those parts, as if they were going to burst; at last, the nervous affection reached the brain, and then the patient was seized with a most sanguinary propensity; and if he could lay hold of any sharp instrument, he was ready to sacrifice the first person that came in his way." "When the affection has continued for some time, and the individuals possessed with the desire of committing murder have been observed, we have seen that his state is like the delirium of lunatics—preceded and accompanied by headache and pains in the stomach and bowels. These symptoms have preceded the impulse to murder, and have become more severe when this dreadful propensity is exasperated."

Taylor, in his admirable treatise on Medical Jurisprudence, reviews the whole theory of Moral Insanity, and points out forcibly the dangers to which it exposes the administration of justice. He refutes, with singular ability, the fallacious idea that a failure to discover a criminal's motive is to be taken as a proof of his insanity. The cases of Moral Insanity referred to by all these writers, are usually instances of homicide, perpetrated by patients on those who are near and dear to them; such as a father or mother on his or her child; a husband on his wife, &c.

Now, is there the faintest resemblance in this case to those described by these distinguished medical writers? In them we find sudden, irresistible fury; here, deliberation, self-control, preparation, concealment. In them, confession; here, denial and flight. In them, a change in the habits of the individual, and conduct in opposition to all human motives; here, conformity to the whole course of prisoner's life, and several assignable motives. In them, disease; here, perfect and uninterrupted health.

But it is urged that if the prisoner had not Moral Insanity, he labored under an insane delusion, which led to

the commission of the horrid deed for which he is called to account, and which renders him irresponsible.

What is an Insane Delusion?

Doctor Brigham, says: "An insane delusion is the mistaking fancies for realities, where the patient cannot be reasoned out of them." Dr. Dimon, however, gives a much better definition. He says: "An insane delusion, is the thorough belief of the reality of something in opposition to the evidence of the senses." An instance or two will illustrate this. Hadfield had an insane delusion that he heard the voice of God commanding him to take the King's life. Sidney Freeman, the prisoner's uncle, had an insane delusion that Jesus Christ was in his throat, choking him. The rule of law which acquits a party of responsibility where he is incapable of distinguishing between right and wrong, would, no doubt, exonerate him who was compelled to the commission of an act by an insane delusion. Such a delusion would lead him to the belief that he was doing right, and thus destroy his reason; and it is an inevitable characteristic of this insanity, that the subject of it should avow and glory in the act to which it impels him, and that he cannot be reasoned out of the belief that he did right. Now, gentlemen, I should affront your intelligence, if I entered upon an argument to show that no such delusion exists here. The prisoner thought he was entitled to pay for the time he lost in prison; other prisoners think the same thing. He thought he was wrongfully imprisoned; all prisoners say this. A misapprehension of legal rights is not an insane delusion; if so, many lawyers and clients are insane. Discontent with imprisonment is not insanity; else, all prisoners are insane. The prisoner's counsel contend that prisoner knew Van Nest had no connection with his imprisonment; if this is so, there is no connection between the delusion and the crime. The prisoner never supposed he was doing right. He fled, fought when arrested, denied all knowledge of the crime, and now tells Dr. Austin, "if they will let me go this time I'll try to do better!" There is,

therefore, no pretence for saying that this prisoner has now, or ever had, an insane delusion.

I have thus called your attention to the various kinds of insanity, and endeavored to show you that this prisoner has none of them, because this is the question which he submits to you, and on which the laws of the land make it your duty to pass.

I hope I have satisfied you that this prisoner is clearly responsible for his acts. He is not an idiot. This is not pretended. He has not dementia. His attention, coherence, memory of events, ancient and recent, keen and steady glance, healthy appearance—all triumphantly repel the idea of dementia. He had no disease when these murders were committed, nor has he now. He has never had an insane delusion. If there was nothing but the atrocity of this case, and the unwearied pains that have been taken to acquit this prisoner, calling for this careful examination of the law and facts in this case, I should cheerfully have gone through with it. But even higher objects than this demanded this labor. Doctrines have been advanced by counsel and witnesses in the course of this trial, dangerous to the peace of society and fatal to good government. The laws and institutions under which we live have been assailed. The maxims of law which have emanated from the wisest and most humane jurists that ever lived—maxims on which the security of liberty, property, and life have reposed for ages; which the successive wisdom of centuries has confirmed, and under which the safety of prisoners, as well as of society, has been protected—are now openly derided and defied. This generation is claimed to be wiser in the elementary principles of law than all that have preceded it. The representatives of medical science on the witness' stand, override and swear down, not only the laws of the land, but the most profound and accomplished treatises on medical science itself. They seek not only to expel the Judge from the bench and the jury from the box, but would banish common sense and the highest scientific attainments alike

from this Court. And what great good is thus to be accomplished? Let the experience of the past answer.

Last winter a convict in the state prison, named Henry Wyatt, assaulted another convict with one blade of a large pair of shears; he plunged it in his bowels; the unhappy convict swooned and died. In March last, Wyatt was tried for this murder; the defence was moral insanity; the jury disagreed. Wyatt has been tried again at this term, and convicted; but on his first trial in March, this prisoner was present and seemed to be an attentive listener. He is undoubtedly hard of hearing, but Mr. Andrus swears he thinks prisoner heard his testimony during this trial, and gives his reasons. Munroe thinks he can hear his testimony; and Dr. Bigelow thinks he knows what is going on in Court. He went, during the trial, to Mrs. Godfrey's, to demand a settlement for his wrongful imprisonment. Mrs. Godfrey testifies to this. He was then boarding with the wife of his associate in the theft. David Winner so states. A few days after, he changed his residence to Mary Ann Newark's, and committed these foul murders. Now, is there not reason to fear that this depraved criminal may have caught from the theories broached on Wyatt's trial, and from the result, an impression that he could commit this crime with impunity? Far be it from me to suggest that the distinguished counsel or witnesses on that occasion ever imagined or contemplated such a frightful consequence. But is it beyond the range of possibilities? And, whether true or not, is it not the imperative duty of those charged in any way with the faithful execution of the laws, to remember that the audience who throng a criminal Court Room, are not exclusively composed of the upright, the intelligent or the humane, and when theories are advanced in such a presence, which strike at the root of law and order, and furnish a perfect license for crime, by rendering its detection impossible, to sift them thoroughly, and if as unsound as they are dangerous, to condemn them publicly and boldly? It needed not the fearful conjectures as to the origin of this

crime, to induce courts, juries and public prosecutors, by every just means, to extinguish sparks which threaten such wide-spread conflagration.

I have canvassed freely the testimony of men eminent for their learning and integrity. I have even ventured within the walls of their peculiar mysteries, and challenged their skill in their own departments and professions. You must also do this. For while the law allows their testimony to be given, (and never was greater latitude given to it than on this trial,) the same law makes it your duty, at last, to pronounce, on the whole evidence, the guilt or innocence of the prisoner. And before I commit the case to you, let me ask your attention to the simple, uncontradicted facts which have been proved to you. It is on these that your verdict must rest, and by these it must be justified. They lie within a narrow space, and there is no conflict of evidence in regard to them. Dismiss, I beg of you, while I do so, all theories and ideas of insanity, and regard this prisoner as a man whose acts immediately prior to the 12th of March, on that day, and the next, you are required to render a verdict on. Apply to them the rule of law I have stated. It is one perfectly simple in itself, abundantly sustained by authority, and covering every conceivable case of criminal irresponsibility:

Did the prisoner know that he was doing wrong, and was he in a state of health that gave him control over his actions?

John G. Van Nest was killed on Thursday night, the 12th of March last. On Sunday, a fortnight before, prisoner, drove out to Harry Lampkin's public house, with three other colored persons, whom he treated and drank with. On the Thursday before the 12th, this prisoner, then living about half a mile from here, at the New Guinea settlement, with the colored woman, Mary Ann Newark, went to the shop of Joseph Morris, a blacksmith, *who had never seen him before*, and asked to have a knife made. He desired it of good cast steel. Failing to make Morris understand

the precise description, he went to a carpenter's shop, and in about fifteen minutes made a pattern of wood, which he left with Morris. This is it. Morris charged him four shillings for it—he offered two shillings. He then offered four shillings for the blade, if Morris would grind it and put a handle to it. Morris said to him: "What do you want to do with the knife?" Prisoner did not answer. Morris then said: "You want to kill somebody, don't you?" Prisoner said: "*It is none of your business, so long as you get your pay for it.*" Morris was told he was deaf, and spoke louder to him than ordinarily. He bought no knife of Morris. On the Monday before the murder, at nine a. m. he went to George W. Hyatt, another blacksmith, *who had never seen him before*, to buy a knife. He had been in before Hyatt saw him. He selected a knife of which the price was two shillings or three shillings. He asked Hyatt if he could not afford it for one shilling and six pence. Hyatt eventually sold it to him for one and six pence. He handed Hyatt two shillings and received six pence back. He then asked to have a handle put on, and a ferule to keep the handle from splitting, which was done. He wanted it ground, which was done by Hyatt and himself on a grind stone. He went off with the knife and returned at twelve o'clock, with a jack knife, the blade of which was out. He asked the price of putting in a rivet. Hyatt answered six-pence. He wished it done for three cents. Hyatt agreed to make the rivet for three-pence, if Freeman would put it in. This was assented to. Hyatt made the rivet, and prisoner riveted it in the handle. He handed Hyatt six pence and received three cents in change. Hyatt discovered that he was hard of hearing; but it is a remarkable fact when this witness, who had sold him the bloody instrument of assassination, called on him three weeks afterwards in jail, and asked prisoner twice, in a very loud voice, at a distance of three or four feet, if he knew him, prisoner leaned forward and would make no reply, except that he *was deaf and couldn't hear!* Mr. Andrus he heard well, and con-

versed with at the same distance! A day or two before the murder, prisoner went to Robert Simpson, a turner and chair maker, and asked him to grind the knife he bought of Hyatt. Simpson had no time to do it, but arranged the grindstone for him, and he ground it for himself. He afterwards rubbed it upon an oil stone, paid three cents to Simpson, and went off.

On the morning of the murder, or the day before, prisoner again came in Simpson's shop with a hickory club; asked permission to use a brace and bit which was granted; put the club in the vice and went to boring in the end of it; seemed to be fitting something in, which Simpson could not see; went off; was gone twenty-five or thirty minutes; returned, and asked for a larger bit, which was loaned to him and used in the same way. He confesses to Dr. Bigelow that he fitted a blade in the end of that club, at the house where he staid. Doubtless this was done between the two visits to Simpson; and in doing so he found that the first hole bored was too small. He also confesses that he took the knives up to the house where he boarded, and hid one under his pillow and the other under his bed. They were so carefully concealed that Mary Ann Newark, with whom he boarded, never saw him have a knife or stick, and never saw any about his room. About the same time he was, on several occasions, drinking at Gale's grocery, and the very night before the murder he was at a ball at Laura Willard's.

We now come to the day of this deplorable tragedy. Simpson is uncertain whether the preparation at his shop was the day or the day before the murder. The two main witnesses who speak of the prisoner on that day, before the murder, with certainty, are both colored; one called by us—Aaron Demun, the prisoner's uncle, and as honest a man as any in Auburn; the other called by defendant—also perfectly honest—Mary Ann Newark, with whom prisoner boarded. One witness—a grocer—testifies that prisoner purchased of him three cents worth of soap, handed him six pence, and received three cents change. Aaron Demun tes-

tifies that on the same day, prisoner came to him and asked for tallow to grease his boots, which was given him; said he was going to hire out by the month with some farmer. (He had been previously to Van Nest to hire out.) His uncle advised him to do so. Prisoner said: "Uncle Aaron, you've a good place here; are you to work here steady?" Demun said, Yes. Demun told him that if he didn't get more than seven or eight dollars a month, he had better take it; and says: "*he talked as rational with me the day of the murder as he ever did.*" Mary Ann Newark says he staid at her house till the bells were rung for meeting, at six o'clock in the evening. He put snow in the tub for her; asked if she had any other chores to do; she did not notice him go off; she thinks he was sober. You will remember that he boarded at her house; or rather, as he described it to his uncle, and as she swears, he didn't exactly board. "I bring my provisions," said he, "and she cooks for me." She says she lent him the cooking utensils, and he cooked for himself. He admits to Ethan A. Warden that on that afternoon he drank a pint of liquor; and he admits to Dr. Bigelow that he went upstairs; threw his knives out of the window; hid them under the wood-pile till he was ready to start; then stood around and thought of it awhile; then concluded to go, any how; got his knives, secreted them in his breast and under his coat, and started.

Van Nest lived about four miles from here, on the Owasco Lake, in a secluded dwelling. Next this side of him, lived his father and mother. Mrs. Van Nest swears that she saw a black man twice in her yard that evening, between eight and nine o'clock. This was no doubt the prisoner. About the same hour Cox met him this side of Van Nest's. At nine o'clock he was around the house of John G. Van Nest. He went past it on the road. Patten met him. There was then a light in Van Nest's house. Williamson was spending the evening there, and Van Arsdale, the laboring man, had not yet gone to bed. He admits that he did not enter, because it was too early, and he waited till he saw Williamson

leave. He must also have seen Van Arsdale, from the back window, when he retired. He then entered the house by the back door, as he had done on the Monday but one previous. It is doubtful whether he stabbed Mrs. Van Nest (who was in the yard) first, or Van Nest. He asserts that he killed Van Nest first. Helen Holmes and Van Arsdale both think they heard Mrs. Van Nest shriek before they heard any other outcry. Van Arsdale heard Van Nest say:—“*What do you want here in the house?*” and in an instant, almost, he heard him fall upon the floor. The door at the foot of the staircase was then opened by prisoner, who inquired if there was a man up stairs. Van Arsdale said, Yes; and prisoner rushed up with this knife, and aimed a blow at him, which was also nearly fatal. Van Arsdale knocked him with the candlestick, pushed him down stairs, and beat him out of the house with a broom-stick. The child, George W. Van Nest, slept in the room where Van Nest was killed. The prisoner stabbed him entirely through, and with such force as to pierce the bed. He must have done this before he attacked Van Arsdale. Outside of the house he had a scuffle with Mrs. Wyckoff, the mother-in-law of Van Nest, who attacked him with a carving knife. He stabbed her in the abdomen and cut one of her fingers; she disabled him by a cut on the wrist. He returned to the sitting room; kicked open the door; saw Helen Holmes and perhaps Van Arsdale still living.

After lurking about the house a little time, looking in at the windows, he stole a horse and fled. The horse took the road to McFarland's instead of to Auburn. At the distance of about a mile from Van Nest's house, as Williamson testifies, prisoner turned him, after going about a rod, and brought him on the Auburn road. When he arrived within a mile of Auburn, the horse fell with him and hurt his leg; he stabbed and left him, and stole Burrington's horse. With this he fled, as he tells Bostwick, the most he cared for being to get out of the county. He fled in the direction of Canada, to the De Puys, who were connections of his by

marriage. They turned him out of the house, suspecting that he stole the horse.

At two o'clock on Friday afternoon, (the murder having been committed at half past nine o'clock Thursday evening,) we find him forty miles from Van Nest's. He offers the horse for sale to Amos, Corning and others, for eighty dollars, its precise value. When charged with stealing the horse, he denies it, and says he had a horse given him, and traded round till he got this one. He reminded Amos of his having seen him at a husking bee, and offered to satisfy him, by the De Puys, that it was all right. He begged to be allowed to go on; refused to let go of the halter; fought; tripped up Amos, who endeavored to detain him, and finally regretted that he *had not a knife to gut him!*

To Taylor, who arrested him for the murder, he denied all knowledge of it, but then admitted stealing the horse. He was then taken into a room by Messrs. Parker and Herick—the former being a friend and acquaintance of Van Nest. They affected to know all about the murder, and urged him to confess. He denied all knowledge of Van Nest. When asked how his hand was cut, he for a long time declined answering, and at last said he had a knife and was whittling with it, and cut himself. When asked where he came from last, he said, "from Phoenix;" where before that, he said, "Syracuse;" where before that, he said "Nine Mile Creek;" where before that, he said he "believed they called it Elbridge;" where before that, he declined answering; and when asked if it was Sennett, he said: "I shan't answer any more; if they can prove anything against me let them prove it!" The answers already given by him had correctly described his route from Burrington's to Gregg's, where he was arrested; it was only when he got back to the scene of the murder, that he refused to answer.

He pretended to be deaf! Taylor once, by inquiring why he murdered that little child, got an answer that he did not know it was a child. At other times, he said to E. A. Warden that he murdered the child to make them feel more;

and to Lynch, that he murdered it for fear it would make a noise. Pressed by Vanderheyden, on one occasion, as to the cause of the murder, he said: "I don't want you to say anything about it;" and being urged, he says: "You know there is no law for me."

He was taken from Gregg's to Van Nest's house, and identified by Van Arsdale, who was still living. This he understands thoroughly; and from that day to this, he has known perfectly that no admission of the murder itself could prejudice his case. He stated to Dr. Bigelow that he had seen Van Arsdale since the murder, alive.

Now, is not this a picture of as cool, deliberate, atrocious murder as was ever presented in a Court of Justice? Was ever preparation more careful? Buying knives of those who did not know him; hiding them; falsely stating to Aaron Demun where he was going; lying in wait; stealing; flying; lying. Was ever self-control more absolute? He did not molest Cox or Patten, whom he met the same evening; he knew Van Arsdale was up stairs, and inquired for him before mounting the steps; he fled when struck, and was beat out of the house with a broom-stick; he knew whither he was flying; he checked the horse, when taking the wrong road. He knew he did wrong; else, why fly? Why steal? Why refuse to give himself up? Why lie?

No comment can add to the force of a simple narration of the uncontradicted facts in this case. They show, beyond the possibility of doubt, that Freeman knew he was doing wrong, and had full control over his actions.

Gentlemen of the jury: I have thus gone through with the evidence in this case; and I cannot but believe that it has left upon your minds the same conviction of the prisoner's guilt that it has upon mine. It is a fearful task, in a capital case, to urge the conviction of a prisoner; but I never remember a case in which I could ask it with more undoubting confidence than in this. There are upon this jury three gentlemen who were challenged by me, and who, before they entered the box, admitted that they be-

longed to a class termed abolitionists. I have not supposed that this rendered them incompetent to sit in this case; but I desired to know whether they entertained any peculiar views in regard to the general neglect of the colored race, which would induce them to hold society, and not the individual, responsible for the crimes which this race commits. Finding that they were disposed to try this case precisely like that of a white man, I have withdrawn the challenge, and am now gratified to believe that these gentlemen will protect the prisoner from all injustice; at the same time they will remember that the cause they advocate can receive no greater injury, and themselves no deeper disgrace, than would flow from their refusal to convict a murderer whom they know to be guilty.

John G. Van Nest, gentlemen, was, as I learn, in every respect one of the most estimable men in this community. He resided with his wife's mother, Mrs. Wyckoff, and, as his aged father testifies, was all that father's dependence in his old age. He, his wife, his mother-in-law, and one of his children, have been slain by this monster in human shape. I know there is always a disposition to forget the dead over whom the grave has closed, and to sympathize with the living criminal, no matter how debased and degraded. But I cannot believe that when such a man as John G. Van Nest is cut off in the prime of life, with everything about him to make the world attractive, and sent, without an instant of preparation to stand before his Maker, that a jury of his neighbors and friends will set at large the instrument of his destruction. It is to me, as you must know, a matter of no concern, personally. The Van Nests were unknown to me; and although the heart of this family tree has been cut out, leaving behind nothing but the dependent branches and decaying roots, I have lost neither acquaintances nor friends. This miserable prisoner can excite no antipathy; he is unworthy of the hostility of any human being. The danger to the peace of this community only affects me, as a lover of good order. If crimes of this magnitude are to

go unpunished, and thus to invite imitation, it is your hearth-stones, not mine, that may be drenched in blood. But I do confess to a feeling of pride at the administration of justice in our state. Elsewhere, the murderer may go at large as a somnambulist, an insane man, or a justifiable homicide. But in New York, thus far, the steady good sense and integrity of our juries, and the enlightened wisdom of our Judges, have saved our jurisprudence from ridicule, and firmly upheld law and order. Thus may it ever be; and I feel entire confidence, notwithstanding the extraordinary appeals that have been made to you in this case, that your verdict will be in keeping with the high character our tribunals have thus acquired, and will prove that the jurors of Cayuga fully equal their fellow citizens of other counties, in intelligence to perceive, and independence to declare the guilt of a criminal.

JUDGE WHITING'S CHARGE.

JUDGE WHITING. Gentlemen of the Jury: The prisoner, William Freeman, stands indicted before you, for the murder of John G. Van Nest, on the 12th day of March, 1846. The questions for you to determine, are, *first*, Is John V. Van Nest dead?; *second*, The cause of his death; and *third*, Was it the act of the prisoner? The death and the cause of the death of Van Nest, are testified to by Doctor Pitney. In his opinion, the wound must have caused almost instantaneous death; and the facts sworn to by other witnesses, show that he fell dead at the place where he received the wound. Was this wound inflicted by the prisoner? You are to judge of the evidence bearing on this point, and it will probably satisfy you that he gave the fatal stab.

The next question is, if you find that the wound was inflicted by the prisoner, is this murder?¹⁷

¹⁷ The Judge here gave to the jury the definition of murder as contained in the statute, and called their attention to the evidence, as bearing upon the premeditated design of the prisoner; the malice, personal or general, by which he may have been moved; the deliberation with which the act was committed; the means used, and the instruments prepared to effect his purpose; his concealment of the instruments at the house where he boarded; the time and the occasion of his committing the act; his flight, and larcenies of the horses, and his denial of his guilt when overtaken; and if, from a consideration of this evidence, the jury should find that the kill-

It is true, that if the prisoner was insane at the time of committing the murder, he is innocent of crime, and must be acquitted. To present this question to the jury in its proper light, they will consider that sanity consists in having a knowledge of right and wrong, as to the particular act charged to have been done by an individual, and in possessing memory, intelligence, reason and will.

Knowledge of right and wrong as to the particular act charged. This is the true rule of responsibility. Not that the accused shall have knowledge on all subjects, or on any particular subject save that charged against him. The knowledge of men is in a great measure proportioned to their opportunity of acquiring it; and as that is unequal, there can be no standard safely assumed, by which to test responsibility, other than that of knowledge of right and wrong upon the specific act charged as a crime. *Intelligence* to know that the act he is about to commit is wrong. *Memory* to remember that if he commits the act he will be subject to punishment. *Reason* and *will* to enable him to compare and choose between the supposed advantage or gratification to be obtained by the criminal act, and the immunity from punishment which he will secure by abstaining from it.

These considerations are consistent with the legal definition of the crime of murder; that is, that it must be committed with a deliberate design to effect the death of the person killed. Crime is the result of will, and is always charged to have been *wilfully* committed.

The law presumes every man sane until the contrary be proved, to the satisfaction of the jury. Insanity is, therefore, a fact to be proved like any other fact, set up or plead by way of defense.

To establish the plea of insanity, it must be clearly proved that the party is laboring under such a defect of reason, from disease of the mind, as not to know the nature of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. He must be laboring under that kind of mental aberration which satisfies the jury that the prisoner was quite unaware of the nature, character and consequences of the act he was committing. If some disease was the acting power within him, which he could not resist, or if he had not sufficient use of his reason to control the passions which prompted the murder, he is not responsible; and the jury must be satisfied that it was an absolute dispossession of the free and natural agency of his mind. So, if his moral and intellectual powers were so deficient that he had not sufficient memory, will, conscience, or controlling power, or if, through the overwhelming violence of mental disease, his intellectual power was for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.

ing of Van Nest was murder, then the jury were to consider the defense set up by the prisoner, to wit: that he was insane at the time of committing the act, and is not responsible for it.

Within this rule, is the prisoner clearly proved, to the satisfaction of the jury, to have been insane on the 12th of March, at the time of the murder? And to decide this, the jury are to look at the conduct of the prisoner before, at the time, and after the commission of the act, and give effect to the proof as bearing upon the state of his mind on the day of the murder. If sane, he is guilty. If insane, he is not guilty. There is no middle ground.

Then, was the prisoner unaware, *first*, of the nature of the act he committed; *second*, of the character of that act; and *third*, of the consequences of it? If the jury find that he was unaware, from insanity, of the nature of the act he committed, the prisoner should be acquitted. If disease was the acting power within him, which he could not resist, he should be acquitted. If he had not sufficient use of his reason, from insanity, to control the passions which prompted the murder, he is not responsible. If the jury are satisfied that there was a dispossession, by disease, of the free and natural agency of his mind, he is not responsible.

The classification of insanity by learned men, has no influence in determining the question whether the prisoner was sane or insane; for if insane, he must be acquitted, without regard to the particular form of the disease. Ignorance is not insanity. The law does not require any degree of knowledge to render a person responsible, beyond that of knowledge of right and wrong, under the rules already explained.

The evidence of the prisoner's insanity is derived from three sources: *first*, from comparison; *second*, from facts; and *third*, from opinions of medical witnesses.

1. From comparison with himself. It would be idle to decide upon the soundness of his mind, by expecting or looking for knowledge and intelligence in him, about matters of which he had never learned anything. He must be taken in his own grade of life and intelligence, to determine whether in that, he has reason, judgment, memory and consistency of conduct. And of his comparison with other men. Those with whom he is compared should be of his own grade, ignorant and uneducated, but who yet have a knowledge of right and wrong, and whose lives and conduct are under the control of conscience and reason, though in a low degree.

2. From facts in the case, which relate principally to his appearance and conduct not being feigned; to the change in him since his boyhood; to his reading and counting; to his hearing; to the breaking the knife in prison; to his sleeplessness; to his buying the steak; to the family insanity; to his stupidity; to his ignorance of and indifference to his fate, and the proceedings of his trial; to his habits of silence; to the expression of and smile on his countenance; to his want of early education; to his conviction and imprisonment in State Prison at an early age; to his treatment in prison; to his assertions of his innocence and wrongful imprisonment; to his claim of pay, and its refusal; to his opinion that he was entitled to pay for his time; the murders because of refusal

to pay him; to his larceny of the horses and his escape; riding into Mrs. Godfrey's yard; his denial of the larceny to Amos and others; his denial of the murders; his being confronted with the dead, and with his accusers; his committal to jail; his confessions there, and the manner of them; his simplicity; his memory of events; his mode of talking, and of relating his story.

The jury should also inquire whether the prisoner was laboring under a delusion.

(The Judge presented to them the case of Kleim, tried at the Oyer and Terminer in New York, and who exhibited evidence of delusion, and an apprehension of danger, indicating an unsound mind; and after explaining to the jury the state of mind in relation to that form of insanity, submitted to the jury whether the acts of the prisoner at the bar were the effects of delusion, or of an unsound and erroneous judgment as to his rights, and the way of redressing his supposed wrongs; and that, in the latter point of view, the jury should consider the proof in regard to his uniform assertion that his conviction and imprisonment had been wrongful and unjust, because he was innocent of the crime of stealing the horse; his opinion that he ought to be paid for his time in prison; his demand of that pay of Mrs. Godfrey, the owner of the stolen horse; her refusal of payment; his calls on the magistrates for process to compel payment, and their refusal of it; his declarations that the people had taken his time and labor, and would not pay him; that they ought to pay him; that there was no law for him; then his preparation of the fatal knife, and other weapons; his conduct on the night of the murder; his concealment of the prepared weapons under the wood; his answer to Dr. Bigelow's question—what he did in the house when he went in after hiding the weapons—"Nothing, but I stood round there, and thought about it. I did not know what to do; but I thought I'd go, any how.")

3. Opinions of medical witnesses. The opinions of medical men, on a question of this description, are competent evidence, and, in many cases, are entitled to great consideration and respect. This is not peculiar to medical testimony, but is a general rule, applicable to all cases where the question is one depending on skill and science in any peculiar department.

In general, it is the opinion of the jury which is to govern, and this opinion is to be formed upon the proof of facts laid before them. But some questions lie beyond the scope of the observation and experience of men in general, but are quite within the observation and experience of those whose peculiar pursuits and professions have brought that class of facts frequently under their consideration.

Upon this ground, the opinions of witnesses who have been conversant with insanity in its various forms, and who have had the care and superintendence of insane persons, are received as competent evidence, even though they have not had opportunity to examine the particular patient, and observe the symptoms and indi-

cations of disease at the time of its supposed existence. It is designed to aid the judgment of the jury, in regard to the influence and effect of certain facts, which lie out of the observation and experience of persons in general. And such opinions, when they come from persons of great experience, and in whose correctness and sobriety of judgment just confidence can be had, are of great weight, and deserve the respectful consideration of a jury. But the opinion of a medical man of small experience, or of one who has crude or visionary notions, or who has some favorite theory to support, is entitled to very little consideration. The value of such testimony will depend mainly upon the experience, fidelity and impartiality of the witness who gives it.

They (medical witnesses) are not to judge of the credit of the witnesses, or of the truth of the facts testified to by others. It is for the jury to decide whether such facts are satisfactorily proved; and if they are proved to the satisfaction of the jury, then they (i. e. medical witnesses) should be asked whether, in their opinion, the party was insane, and what was the nature and character of that insanity.

The opinions of persons not educated to the profession, but who have been so situated as to have given particular attention to the disease, and to patients suffering under it, are also competent evidence, but not to the same extent as those of medical men of the same experience.

This evidence, from these sources, applies on the one hand to the state of the prisoner's memory; to his knowledge and intelligence; to his conduct in life; to the state of his conscience; to his power of comparison or reason; to his judgment and to his motives of revenge; and, on the other hand, to the delusion under which he may have labored; to the disease of his mind, and the character of that disease; to his personal appearance; to the expression of his countenance, and to his indifference to his fate.

The evidence bearing on the issue of insanity, is derived from sixty-five witnesses, seventeen of whom, including nine physicians, testify that, in their opinion, the prisoner was insane when the murder was committed; and the residue of them, including eight physicians, testify that, in their opinion, the prisoner was sane. The number of witnesses who have given opinions is referred to, not for the purpose of governing or influencing the minds of the jury, but for the purpose of cautioning them that it is not the number of witnesses that should control or decide this question, so momentous to the prisoner, but it is the intelligence, the skill, the integrity, and the opportunity of acquiring correct and reliable information upon the subject of his opinion, that gives weight and value to the testimony of a witness. And if the jury should judge of the evidence by any other rule than this, they would do great injustice to the prisoner as well as to themselves.

And if the jury, weighing the evidence in this light, under the solemn responsibility resting upon them, both to the people and

to the prisoner at the bar, find him insane on the 12th day of March last, they will render a verdict of not guilty by reason of insanity. And if they find that he was sane and that he killed John G. Van Nest, by the means laid in the indictment, they will find him guilty.

THE VERDICT AND SENTENCE

July 23.

This morning the jury came into court with a verdict of "guilty of the crime wherewith he stands charged in the indictment."

JUDGE WHITING announced that he would pronounce sentence upon the prisoner next morning at half past six.

July 24.

The prisoner was brought in by the sheriff and his deputies.

JUDGE WHITING: Freeman, you have been tried for killing John G. Van Nest; the jury say you killed him and we are now going to sentence you to death. Do you understand this? Do you know what I mean?

Freeman: I don't know.

JUDGE WHITING: In the defense of this wretched man, some of the best talent of the country has been faithfully exerted, and the attendance of medical men from Albany and Utica, procured to testify as to his insanity. A large number of respectable men, some of whom had known him from childhood, both in and out of the prison, have testified that they never had discovered or suspected anything like insanity in his conduct before the murder. And after hearing all the proof adduced to sustain his defense of insanity, at the time of the murder, an intelligent and conscientious jury have decided that he was not insane, but a responsible man.

In this opinion the Court unanimously concur; so that the prisoner has been found to have been sane when put upon his trial, and also at the time of committing the murder. No serious question as to his guilt, in committing the murder, has been raised. His whole defense has rested upon his alleged insanity. And after twenty-four men have said upon oath he is sane, it is to be hoped that those who have heretofore doubted it, will yield to an opinion thus carefully formed and solemnly expressed.

This degraded and ignorant felon, who has consummated his wickedness by these atrocious murders, has had the benefit of two verdicts. Let it not be said that the administration of justice is partial or prejudiced by reason of his color, his social degradation, or his monstrous crimes. Slow and tedious as these proceedings have been, the Court are certain that in the minds of all reflecting men, a confidence will arise in the power of the laws to protect the rights of our fellow citizens, and that the result will reflect honor upon the institutions and laws of the country.

A family of high respectability; of great moral worth; having

numerous connections and relations; independent in circumstances, and in the full tide of life, have been cut off in a moment, at their own fireside, where they reposed in security and peace, by this degraded and malicious man. That the public mind was excited and the public indignation freely expressed, was natural; and most creditable it is to the love of order which prevails in the community, that no violence was perpetrated upon his guilty head. All can now see that if the guilty are left to the laws, there is power in their provisions, and fidelity in their execution, to protect all and any interest of society.

The lessons to be drawn from this tragic event are many. The most impressive one is, that there is a duty upon society to see to the moral cultivation of the colored youth, now being educated for good or evil in the midst of us. This is so obvious that it needs no comment.

While we give full effect to the plea of insanity as an excuse for crime, we learn, with great satisfaction, that there is, in the common sense of the community, intelligence enough to discriminate between acts originating in moral depravity and ignorance, and those which proceed from the impulse of disease. The rule by which a man must be judged, is whether he had knowledge of right and wrong in regard to the act for which he is on trial. If he had, he is responsible, and is neither an idiot nor an insane man. By that rule the prisoner has been tried and convicted. And whatever theories learned men may create, there is no other which can be safely introduced into a court of justice.

We trust that the prisoner, during the term of life which remains to him, will receive the care and instruction of good men, to enlighten his darkened mind to a true sense of his condition, and to prepare him for the change that awaits him. For this purpose the sheriff will no doubt admit the visits of all such as are disposed to see him.

The judgment of the law is, that the prisoner at the bar, William Freeman, be taken from this place to the place from whence he came, there to remain until Friday, the eighteenth day of September next, and that on that day, between the hours of one and four in the afternoon, he be taken from thence to the place of execution appointed by law, and there be hung by the neck until he shall be dead.

THE NEW TRIAL AND DEATH OF FREEMAN.

An appeal was taken to the Supreme Court and argued there in November. A new trial was ordered. See 4 Denio.

During the proceedings in the Supreme Court, the prisoner remained in chains in the jail of Cayuga County. After the Court had granted him a new trial, he was visited by the Circuit Judge, and examined with reference to his mental condition, and the propriety of a second trial. He found the prisoner in a gradual decline

of health and strength, and as unconcerned about his fate as when upon trial for his life. He was never retried for he died of disease of the lungs on August 21st, 1847.

"So great had been the conflict of medical opinions, as to the mental condition of William Freeman at the time he assassinated the Van Nest family, during his trial, and, indeed, until his death, that when the morning prints of the 21st of August, 1847, announced his death, the inhabitants of the city of Auburn, with an almost unanimous impulse, expressed each to the other the desire that the body of the wretched being should be examined. To some, his life had been one of crime; to others, it had been one of moral innocence, yet of misfortune and distress; to others yet, in numbers abundant, it had been a perfect, yet painful riddle, which they hoped medical science might enable the learned to solve, by a careful examination of the physical organs through which, in life, the prisoner's mind was manifested."¹⁸

This took place at once, most of the physicians that had testified on the trial being present. It was conducted by Dr. Bingham. The majority of them issued the next day the following:

"The undersigned being present at the examination of the brain of William Freeman, coincide in the opinion that this organ presented the appearance of chronic disease; that the arachnoid membrane was somewhat thickened and congested; that the medullary portion was of an unnatural dusky color, and in places harder than natural, as if par-boiled; that the posterior portion of the skull appeared diseased, and the dura-mater at that point unnaturally adherent; and that the left temporal bone in the vicinity of the auditory nerve was carious and much diseased."

The opinion of the others may be gathered from Dr. Dimon's statement.

"To the statement made by the other physicians, I could not subscribe. The arachnoid membrane had, to me, a uniform appearance, one part being no more thickened than another; and had a natural transparency throughout. The same was true, so far as I could see, of the substance of the brain. If there was any unnatural hardness or density of the brain, or alteration of color, (so far as color could be determined by candle light,) it extended, with remarkable uniformity, throughout its entire structure. No portion of it indicated, to my senses, any decided marks of disease. Whatever general unhealthy appearance it might have presented, which my experience would not enable me to detect, could be attributed to another disease, which was the cause of death, and about which there was no doubt and no difference of opinion."

¹⁸ Report of Trial (Hall, B. F.), ante p. 327.

THE TRIAL OF EDWARD O. COBURN AND
BENJAMIN F. DALTON FOR THE MAN-
SLAUGHTER OF WILLIAM SUMNER.
BOSTON, MASSACHUSETTS, 1856.

THE NARRATIVE.

Benjamin F. Dalton, a young man of twenty-two, of good family and prospects, who stood high in the estimation of the mercantile firm in Boston with which he was connected, married Helen Maria Gove, a school-girl of seventeen. He lived with his young wife at a stylish boarding-house in a fashionable part of the city and for about five months was one of the happiest of men; a kind and affectionate husband and loved and esteemed by all within the circle of his acquaintance. The period of the honey-moon had scarcely passed when the clouds began to lower and his domestic happiness was broken and destroyed. Dalton, devoting himself to business early and late and his wife—having no taste for reading and having much time on her hands, with her sister Fanny, who was married to Edward A. Coburn, formed the acquaintance of and began a flirtation with, two young men, named Sumner and Porter. Sumner was a student in a business academy in the city and Porter, his cousin, was a young lawyer without any practice to engage his attention. The four used to meet at restaurants, take drives together into the country, and stop at hotels there, and soon Sumner fell violently in love with Mrs. Dalton and wrote her a good many affectionate letters, to which she replied—though not in the warm terms that he employed. Sumner likewise called on Mrs. Dalton at their lodgings and at Mrs. Coburn's more than once. They also

exchanged rings. All these transactions were concealed from her husband, who did not even know of the existence of his wife's lover until one day in a bureau he discovered two of Sumner's letters. Confronted with them his wife made an unsatisfactory explanation, but threw the blame on her older sister, Mrs. Coburn.

Dalton talked the matter over with his brother-in-law, the result of which was that the two women were compelled to write to the men inviting them to call at Mr. Coburn's residence. Porter duly received his note and came as requested about eleven o'clock in the morning and did not leave until he had received a beating at the hands of Mr. Coburn. Sumner did not get his letter, but Mrs. Dalton having confessed that she was to meet him at a restaurant that afternoon, Dalton went there and brought him back to the Coburn house in a carriage. There the husband heard their story; they both denied any criminality and though in deep distress, he believed his wife until Sumner for some reason becoming alarmed, threw himself at their feet for protection. This so exasperated the husband that he thrashed Sumner severely and would perhaps have seriously injured him had he not succeeded in making his escape over the back fence. He left Boston and went to his home in Milton where shortly afterwards he sickened and died. The newspapers got hold of the story; the affair was greatly exaggerated, created a sensation, and the result was that Dalton and Coburn, (for the latter was present at the beating) were arrested on the charge of having caused his death, were indicted for manslaughter, and lodged in jail.

There could be no denial of the fact of the assault, but the medical evidence went to show that Sumner died from disease, not the result of the beating. The jury acquitted the two of the serious crime but convicted them of assault and battery, for which they were sentenced and served four months in the Boston jail.

Then followed a suit by Benjamin F. Dalton for divorce. (See post p. 587.)

THE TRIAL.¹

In the Municipal Court, Boston, Massachusetts, January, 1856.

HON. ALBERT H. NELSON,² *Chief Justice.*

HON. STEPHEN G. NASH,³ *Associate Justice.*

January 24.

Today Edward O. Coburn and Benjamin F. Dalton were arraigned for trial. The indictment charged them with the manslaughter of William Sumner in the house, 84 Shawmut Ave., Boston, by beating, of which wounds he died. The beating occurred on November 17 last, and his death on the 11th of the following December.

*District Attorney Cooley*⁴ for the Commonwealth; *S. D.*

¹*Bibliography.* Boston Daily Times. Complete report of the trial of Edward O. Coburn and Benjamin F. Dalton, for the manslaughter of William Sumner. By the reporter of the Times. Boston: Burnham, Federhen & Co., 9 and 13 Court St.

²NELSON, ALBERT HOBART (1812-1858). Born, Milford, Mass. Fitted for college at Concord Academy, 1832. Studied law with Samuel Hoar of Concord. Grad. Harv. Law School, 1837. Began practice at Concord but removed to Woburn, Mass., 1842, and opened an office in Boston. District Atty. (Middlesex and Essex) 1846. Member of Executive Council, 1855. Member Senate (State) 1848-1849. Chief Justice Superior Court, County of Suffolk, 1855-1858.

See: Davis, (W. T.) Bench & Bar of Mass. 1895; Harv. Uni. Catalog (1636-1919); 1915; Willard, J. A. Half a Century with Judges & Lawyers.

³NASH, STEPHEN G. (1822-1894). Born, New Hampton, N. H. Studied for college in New Hampton. Grad. Dartmouth Col. 1842. Engaged in teaching, first in New Hampton where he taught classics, later Principal of Noyes Academy, Franklin, N. H., studying law at same time with Judge George W. Nesmith. Removed to Boston; admitted to Bar, 1846. Practiced in Boston; Judge Superior Court, Suffolk Co. 1855-1859. Resumed general practice in Boston. Member Legislature, 1855. Died at Lynnfield, Mass.

See: Davis (W. T.), Bench & Bar of Mass. 1895, v. 1. General cat. Dart. Col. 1769-1910; 1910-1911. Herndon (Richard) Boston of Today, 1892.

⁴COOLEY, GEORGE W. Came to Boston from Bangor, Maine. Admitted to Maine Bar, 1835; Suffolk Bar, 1843. Attorney for Suffolk County, 1854-1861.

See: Davis (W. T.), Bench & Bar of Mass. 1895, v. 1; Boston Direct. 1859.

Parker,⁶ *R. H. Dana, Jr.*,⁶ and *Nathan Morse*⁷ for the Prisoners.

The indictment was read and the Prisoners pleaded *Not Guilty*.

Boston, Jan. 24.

This morning Edward O. Coburn and Benjamin F. Dalton—indicted for the manslaughter of William Sumner, by beating him in house No. 84 Shawmut avenue, on the 17th November last, of which wounds it is alleged that the said Sumner died on the 11th December following—were arraigned for trial.

Mr. Parker stated that there were many unfounded rumors in circulation in regard to the conduct of the defendants, and as some prejudices might exist among the minds of the jurors injurious to the interests of the defendants, he asked the Court to propound certain questions to each juror, in order that the defendants might have an opportunity to show, if they could by legal evidence, that each or any juror was biased and had expressed an opinion in the case.

The following question was put to each juror before being sworn :

Have you expressed, or have you formed any opinion upon the subject matter now to be tried, or are you sensible of any bias therein, or are you related to either of the parties?

The following were then empaneled—Ezra Forrestall, foreman; Wm. Bacon, Reuben Balcom, Benj. Luckis, Chas.

⁶ See: 3 Am. St. Tr. 665.

⁶ See: 5 Am. St. Tr. 648.

⁷ MORSE, NATHAN (1824-1894). Born, Moultonborough, N. H., where he attended public schools. Removed to Boston, Mass. 1843. Studied medicine a short time but decided to turn to law, graduating Harv. Law School, 1846. Admitted to Suffolk Bar, 1847. Entered at once on practice (Ranney & Morse 1852). Common Councilman, 1863. Died Jamestown, R. I.

See: Davis (W. T.), Bench & Bar of Mass. 1895, v. 1; Herndon (Richard), Boston of Today, 1892; Willard (J. A.), Half a Century with Judges & Lawyers; Harv. Uni. Catalog (1636-1919); 1915.

W. Bowker, Wm. Buss, Samuel F. Carll, Ralph S. Cate, David Clapp, John R. Copeland, Sylvender Forrestall, Manly Howe.

The indictment was then read and the defendants plead NOT GUILTY.

The District Attorney said that allusion had been made to the public feeling which existed against the prisoners, and he thought that in such a case of supposed crime it was material that the people should express their opinions freely and emphatically. But he was glad to know that within the minds of the jurors there was no bias to impair the calm deliberations of reason and judgment. He who comes into court arraigned as a criminal, is to be regarded as innocent. The presumption of the law is, that all parties are innocent until found guilty. The government has no interest in any case except the fair administration of the law; and the jury have only to see that the charge against these, or any defendants, is established. This is the security which society has from a repetition of offenses like the one we have now to try. It is my earnest desire that these defendants should have the benefit of any presumption of innocence up to the moment when their guilt shall be established; and if found guilty, then I look for a verdict without any reservation or partiality.

In regard to the different degrees of homicide, the crime of homicide is lawful and justifiable when committed in self-defense. In all other cases homicide is unjustifiable, and it has the degrees of murder and manslaughter. The distinction between murder and manslaughter is the absence of any malice in the latter. A man who kills another in a duel, although the killing was intentional, is guilty of manslaughter only, because the law allows for the infirmity of men's tempers, and mitigates the crime, unless previous malice is proved. In cases where the Court is satisfied that death was not intended, the punishment is in the discretion of the Court, and may be but an hour's imprisonment and a fine of one dollar. The extent of the punishment for manslaughter is twenty years imprisonment. If a man discovers another in the act of adultery with his wife, and he kills the adulterer on the spot, the law calls the crime manslaughter. But if in the same case when the man witnesses the act of shame, and subsequently he prepares himself with weapons and kills the adulterer, the law calls it a murder. In the case to be tried, it appears that the defendants enticed the deceased to their house. The plan was concocted hours before, and they deliberately carried it out, in the end inflicting great bodily injuries, the consequence of which was the death of the party. This was a case of manslaughter—some think that it was a higher crime. At any rate, it is sufficiently lenient, and we shall see that they have justice done them. The death of Sumner is directly traceable to the punishment inflicted by the defendants. This was the pri-

mary cause, and it will be a question whether the primary cause, as found by the government, was not the proximate cause of the death.

THE WITNESSES FOR THE COMMONWEALTH.

Agnes Keenan: In November last was employed in Mr. Fera's shop; saw defendants in the shop on 17th November in the latter part of the afternoon; saw a person there of the name of Sumner. Defendants asked for Sumner; they sat down and waited a little while, when Mr. Sumner came in. Heard Mr. Coburn ask Sumner how long he had been acquainted with her; Mr. Sumner replied: "A very short time." Know Mr. Porter; he had visited the shop with Sumner several times during the previous two weeks—about twice a week. Never saw Sumner come in with any other man. Mr. Coburn left the store and Sumner and Dalton remained behind; Mr. Coburn returned in a few minutes in a carriage and Dalton and Sumner went into the carriage. Do not know who drove the carriage or where it went to; the horses were headed towards Tremont street.

Cross-examined: Coburn and Dalton, when they came in on 17th November, had chocolate and dry toast; they were at the table when Sumner came in and got up to meet him. Saw one of the gentlemen shake hands with Sumner; their conduct appeared to be gentlemanly. As soon as the carriage came to the door Dalton and Sumner went out, without any invitation, and got into it. Sumner and Porter came to the

store about twice a week with two ladies; they always came with the same ladies; the doors of the saloon were always open. The gentlemen and ladies never came to the saloon together; sometimes the ladies came first and sometimes the gentlemen. Never saw them go away in a carriage.

Oliver Gregg: Keep a stable in West street; went to Fera's shop with a carriage in the month of November last; two persons got into the carriage when I arrived at the shop; left them at a house on Shawmut avenue; they all went into the house.

William Chadburn: Am a police officer; was at the house of Mr. Coburn, 84 Shawmut avenue on 17th November last, in company with Mr. Richardson. A large company was assembled on the outside; heard no cries from the house. Rang the bell and it was answered by Mr. Coburn who admitted Mr. Richardson, Mr. Grant, Mr. Whiton and myself. We went into the front room; saw Dalton and another gentleman whom I did not know. Coburn said that two men had taken improper liberties with their wives and that they had got the two men to the house that day and had given them a d——d thrashing. After describing the manner in which he got Porter there he said that he got Sumner there in

the same way and treated him in the same manner. I cannot recollect the language he used. He asked us to disperse the crowd outside and we done so. He said, "We" got Sumner to the house; he referred to Mr. Dalton as the other person. Went to the house again about nine o'clock in the evening. Mr. Coburn said, "We got Sumner upstairs in the presence of the ladies and asked him some questions which he could not clear up. We then took him down stairs and flogged him and gave him the benefit of the back yard."

Cross-examined: Heard Coburn say that they cowhided Sumner and gave him the benefit of the back yard; did not hear him say that they assaulted Porter.

Henry Nutter: Was in Shawmut avenue on 17th November last; was at work in the adjoining block. About five o'clock came out of the house and heard the cry of "murder." A female looked out of the third story window and said that somebody was killing somebody; said something about bursting the door in. Rang the bell once and it was not answered, then tried to break the door open but did not succeed. After this several persons tried to burst the doors in but could not. I stepped out into the street and could see the females at the third story window; one of the females would pull the curtain up and the other would pull it down; then went after Mr. Richardson who had passed the house a few moments previous, and he came up with an-

other policeman; he tried the door but could not get in; said that he did not want to break the door in and went after a posse of policemen, who came and went into the house. When I went to the door to get in heard a scuffling in the floor above the front landing; also heard the cry of murder from the same floor; it was a female voice that cried murder. Heard the exclamation of "Oh, don't, you'll kill me." Did not hear any sounds that came from the furnace-room; the scuffle in the entry appeared to be a violent one.

Cross-examined: The exclamation of, "Oh, don't, you'll kill me" was in a female voice; did not hear a male voice in the house.

Jeremiah Donovan: Was on Shawmut avenue on 17th November last, employed in moving lumber. Saw a carriage drive up to No. 84 and three gentlemen got out; Coburn, Dalton and another gentleman went in; did not know the other man. Cannot recognize the man who drove the carriage; think it was the witness on the stand this morning. In about fifteen minutes after, a lady put her head out of the window and called for help, and I gave the alarm to some carpenters near by. She opened the window a second time and called for help; after this a lady made an attempt to get at the window and she was pulled back. Was then told by somebody to go through the area leading from the front part of the house to the back yard, and see if I could get into the house; there

is a door opening into the furnace-room from the area and I tried to open it but could not. Went into the yard and tried to open the door of the wash-room but it was locked; then tried to get the windows of the wash-room open but they were also locked. Heard a noise like scuffling; also heard somebody groaning as if in pain; think it was a man. Did not hear any noise when I tried the door of the furnace-room.

William Wilson: Was on Shawmut avenue on 17th November last; saw a carriage drive up to No. 84 and three persons got out; they went into the house; in about ten minutes a lady threw up a window and cried "murder." I told her the door was locked and she told me to burst it open. I rang the bell and nobody came; heard a noise of pulling and hauling in the third story, then it seemed to come down stairs into the basement room on the ground floor. Heard murder called down there; it was a female voice. Heard somebody say, "Don't do so, you'll kill me." Heard this exclamation a dozen times; it sounded to me as if in different parts of the furnace-room. Heard a struggle like pushing and hauling in the front entry. Saw Officer Richardson there; was trying to break in the door when he came up with another officer. Mr. Richardson rang the bell but it was not answered and he went for assistance, leaving the other officer behind. While he was gone some person came to the door and spoke to the officer. I

asked him if the lady was hurt and he said that she was not hurt, but excited about the cow-hiding affair; he then shut the door and went in; he was in his shirt-sleeves when he came to the door.

Henry M. Flanders: Am a cousin of Coburn. Was at Mr. Coburn's house on the 17th November last. (Witness described the house.) Went to the house about ten o'clock on 17th November; saw Coburn and Dalton there, and the ladies; staid there a short time and then walked down Washington street, met Coburn and Dalton going home; went back to the house with them. On the way Coburn told me about the affair with Porter. Went upstairs to Mrs. Coburn's room with Mr. Coburn, a front chamber in the third story; Dalton was in the room with us; the affair with Porter was mentioned and Mr. Dalton said there was another man who had got to take something similar; he said that the man had been intimate with his wife. We went out; after we got out they said they were going down to Vinton's to meet Sumner and should try to get him into the house; they said if they did not get him into the house, they should whip him wherever they did find him, as they meant to whip him at any rate; think that they both said this. They then went down town and I went to Dr. Blake's office; this was about three o'clock in the afternoon. They spoke of the Porter affair as of a matter that had passed by. The ladies requested them not to flog Sumner. The only threat

I heard against Sumner was from Dalton who said that "he was going to whip him." About five o'clock went to Coburn's house in company with Dr. Blake; I rang the bell and the cook let me in. Had been there a few minutes when I heard a scuffle upon the stairs and presently saw Coburn and Sumner coming down stairs. Mr. Sumner attempted to get out of the front door; he went towards the door, and Coburn and Dalton pulled him along the entry, and went down the basement stairs into the basement; the scuffle in the entry lasted three or four minutes; they told me they took him into the wash-room; went to the head of the basement stairs and thought by the noise that they were in the furnace room or entry; heard scuffling and loud talking down stairs; I heard Mr. Dalton ask Sumner if he would ever recognize or go with a married woman again? He said he never would if they wouldn't hurt him. Thought I heard the sound of blows; cannot tell how often I heard the sound of blows. Thought that the scuffling was in the furnace-room. When Dalton came up from the basement, he was in his shirt-sleeves; did not see him go to the front door in his shirt-sleeves; he might have done so.

January 25.

Henry Flanders: Did not hear any exclamations before the parties came down stairs; heard an outcry of women screaming and screeching; did not hear them utter any words; did not hear any exclamations from fe-

males down stairs; there were no females in the basement to my knowledge. Did not hear the words, "Oh, don't, you'll kill me." Did not hear any direction given by either of the defendants not to have the door opened; have no knowledge of the windows and doors being fastened especially for this occasion. Saw no person in their shirt sleeves besides Mr. Dalton. Did not see any more of Sumner after he went down stairs. Coburn and Dalton went upstairs to Mr. Coburn's chamber. Did not see either of the defendants inflict any blows on Sumner; did not see anything done in the basement, only heard the noise. Dr. Blake, Miss Adeline Coburn, Mrs. Coburn, Miss Adelaide, a cook and a nurse whose name I do not recollect, were in the house at the time. Did not see any other male persons in the house than the defendants, Sumner, Dr. Blake and myself.

When I went up to Mrs. Coburn's room, Mrs. Dalton and Coburn, Miss Adeline Coburn, Dr. Blake, Mr. Coburn and the nurse were in the room; think Mr. Dalton was there also. Mrs. Dalton said she thought "they had whipped him too severe." Do not recollect that Mr. Dalton made any reply. While on the way upstairs to Mrs. Coburn's chamber think both of them said, "We have given him a good flogging." They told me afterwards they had put him out the back way and made him jump over the fence; they said they had pulled him back while he was on the fence and struck him again. Said they flogged

him with their hands and fists. They said nothing about kicking him, or of having any instruments in their hands; they said nothing about having pushed his head against a brick wall; they said nothing about pushing his head against any thing when he stooped down to pick up his cap; I did not see any implements or instruments in their hands while I was in the house. Think they said that Porter had got the worst whipping. Did not see any cowhide in the afternoon; they said that they had whipped Sumner with their hands; do not recollect that they said Sumner, in getting over the fence, fell among some rubbish on the other side.

Samuel C. Blake: Reside at No. 136 Shawmut avenue; Mr. Coburn lives No. 84 same avenue. Was there on 17th November last, twice; the first time near one o'clock; saw Mrs. Coburn, Miss Adeline Coburn and Mrs. Dalton. Before I left the house Mr. Coburn, Dalton and Flanders came in. Went to the house professionally. Mrs. Coburn was sick and confined to her bed; she was in an excited state and very nervous. I was informed that she had fainted away during the excitement of the Porter affair; she said she had fallen down and hurt her side. Coburn and Dalton were conversing about Sumner and gave me to understand that they were going in pursuit of him to chastise him for improper intimacy with Mrs. Dalton; they said that they should get him to the house if they could, but if they did not

get him to the house they should chastise him wherever they found him. I went back to the house between five and six; Mr. Flanders went with me. Stepped into the sitting-room and saw the nurse with a babe in her arms. A few moments after heard violent screams from the chamber over head—nothing but frightful screams. Immediately went upstairs; as I passed up three persons passed by me very rapidly; did not recognize these persons, could not say they had hold of each other. There was no light in the entry. Found Mrs. Coburn on the bath-room floor at the head of the stairs; she was insensible. Mrs. Dalton stood in the door of her own chamber. I took Mrs. Coburn up and laid her in her own bed in the front chamber. Miss Adeline Coburn and Mrs. Dalton were screaming. Did not hear any noise down stairs. Did not hear the cry of murder, nor any distinct exclamations at any time. Did not see anybody pull up the curtains; it might have been done while I was attending to Mrs. Coburn.

After Coburn and Dalton came upstairs, one or both of them said that they had chastised Sumner, but that they had not flogged him so badly as Porter, because they thought that he did not deserve it so much. Said they had used some instrument in chastising Porter, but had not done so in Sumner's case because he was not so guilty. Said that they gave him the exit by the back way because they thought he did not deserve to go out the

front way. They said that they pulled him back, and my impression is that they struck him then.

Think Coburn said "two men had taken improper liberties with their wives, and they had given them a d——d thrashing." One officer said they had served them right. In speaking of the affair to me Mr. Coburn spoke of spraining his thumb in the affray with Sumner.

Cross-examined: I heard no screams by male voices. Was not there by any design other than to see Mrs. Coburn; was not requested to go there for any other purpose than professionally. Did not expect to meet Sumner in the house.

Charles B. Whiton: Previous to first of December was in a store in Federal street and Mr. Dalton came in; he mentioned that he thought of bringing a suit against Mr. Sumner. Told him that Sumner could retaliate and bring a suit against him. He said that Sumner could only bring a suit for assault and battery as he only beat him with his fists.

Margaret Weare: On 17th November lived with Mr. Coburn as a cook; remember the affair of Porter's that day between twelve and one o'clock. After Porter left the house Mr. Dalton came into the kitchen and told me that if another young man should come to let him in. I told him, "No, I would not if they were going to beat him as they did the other young man." Mr. Dalton said "they were not going to beat him as they did the other young man." Mr. Dalton said,

"they were not going to beat him but give him a good talking to." About an hour or more after that a carriage came. Saw Mr. Coburn and Mr. Dalton and another young gentleman come in; was in the kitchen at the time and the door was open. Could distinguish Sumner from Coburn and Dalton because he was so much smaller. About five minutes after they went upstairs heard a screaming by the ladies upstairs; did not know whether it was Mrs. Coburn or Mrs. Dalton that screamed—they both cry alike. Next that I saw was three persons near the front entry door; these were Coburn, Dalton and Sumner. Next heard some scuffling in the basement. When I heard the noise I went to the dining-room door; I judged the scuffling was in the wash-room; the noise was quite loud. I heard somebody down stairs ask forgiveness and say he would never do so again. The boy down stairs said he would not have been there if his cousin (Porter) had not brought him into the scrape. Did not hear him use the word "kill." I did not see any instrument in the hands of the parties. Mary, the nurse, was in the sitting-room at the time, and crying. I cried myself and halloed that they were going to kill him. Did not hear the nurse or anybody on that floor say, "Oh, don't, you'll kill me." About half an hour afterwards, Mr. Dalton came into the kitchen and I said to him, "You beat him, after all." He replied, "He made more noise than he was hurt." Mr. Dalton did not live

in the house, he came there with his wife the night previous. They went away on Sunday, the day after the flogging. Dalton, Coburn, Flanders and Sumner were all the male persons I saw in the house at the time.

Cross-examined: The door of the wash-room is always fastened except on wash days. The windows in the wash-room are always fastened; the door of the archway is generally unlocked; the windows of the furnace-room looking out into the back yard are always fastened, also the door of the furnace-room opening into the archway; had no orders to fasten the doors or windows on that day.

Dr. John D. Hill: William Sumner came to my office on Friday subsequent to the 17th November at two p. m. and staid about half an hour; he was very warmly clad and had his coat collar turned up. He appeared dejected, laid down on my lounge and put his hands to his head; he appeared to be suffering; noticed a black-and-blue mark under his left eye; the wounds extended back to his ear. I brushed his hair back and my hand touched the soft spot of his neck; he said that the touch hurt him. His neck was swollen under his ear. The bruises covered the posterior half of the ear and it appeared to have been made by a direct blow which descended to the neck, and could not have been given by the fist. There was more of a redness on the neck than marks of any bruise. The mark under the left eye was circular in shape and the

skin had been broken. He complained of the tendons hurting him. There was no discoloration on the left shoulder. Passed my hand over his chest and he complained of that hurting him and of soreness there. Passed my hand over the region of the pit of his stomach and he shrunk from the touch immediately. He complained of being unable to eat anything and said he could not keep his food on his stomach and had vomited a great deal since Saturday 17th. He also complained of a stiffness in his lower jaw and had to bear it down with his fingers so as to swallow; he said that he noticed this on Saturday night (the 17th) when he was drinking tea. Had known him intimately for six months previous and he always appeared to enjoy excellent health. I did not see Sumner again until after his decease. Was at his funeral and saw the body; observed that the mark under the eye was about the same; the mark on the ear was not so bad; there was a discoloration on the neck; should think that a wound from an ordinary blow with the fist would not remain discolored for so long a time; a blow from the fist would not have made so well defined a mark, it would be more diffuse and have various shades of color; the blow under the eye was very deep and appeared to have been given by some instrument.

Cross-examined: Mr. Sumner was never a patient of mine; he did not ask me for a professional examination; I made it voluntarily; I have been a

practicing physician since 1850; confined myself to general practice until within a year; since then I have confined my practice to diseases of the urinary organs, and have advertised myself in the newspapers; have abandoned general practice in medicine. Saw the wound under the eye when Sumner called at my office—the skin had united. I think blood must have passed from the wound. The blow must have been given by an instrument, it could not have been produced by a blow of the fist. A blow from the fist would produce a more diffused discoloration.

S. Henry Stone: Am a merchant in Kilby street. On 17th November last met Mr. Sumner at Mr. Porter's office about two o'clock; Sumner was writing at his table. At that time saw no signs of injuries on Sumner's person. Next saw Sumner after the examination of Porter's assault case. On the following Thursday at Mr. Porter's office he showed me some bruises on his person; had a mark under his left eye, also his left ear. He had a piece of court-plaster on the mark under his eye—his eye was black. The swelling behind the ear was of considerable extent; did not notice that he had any difficulty in breathing, but he said that he was troubled to get a long breath.

Mary Hunter: Lived with Mr. Coburn, 84 Shawmut avenue in November last. Was employed to take care of Mrs. Coburn's child; I was in the house when Mr. Coburn, Mr. Dalton and Mr. Sumner came in. I heard scuf-

fling in the entry; went into the kitchen and cannot tell where they went to from the entry; did not hear any noise down below. Returned to the entry in a few minutes to see if I could observe what was going on; when I got into the entry I heard a noise of scuffling down stairs; I think that they were in the wash-room and the entry down stairs; the scuffling down stairs lasted three or four minutes; heard no sound of blows; did not hear any person cry, "oh, don't, you'll kill me;" did not say it myself.

Cross-examined: When Mr. Sumner came in he said, "How do you do, Nelly?" and held out his hand. She made him no answer, and gave his hand a slap; Nelly is Mrs. Dalton; went right out; afterwards heard Mr. Sumner say he was not the cause of it, he was very sorry for it, and his cousin had drawn him into it. Saw Sumner after he got over the fence; he was stooping down to pick up his hat which, thought, had fallen off when he jumped over the fence.

January 26.

Josiah Porter: I am an attorney—reside in Cambridge; was in the habit of visiting Fera's Italian saloon in West street with my cousin, Wm. Sumner; our first visit there was two or three weeks previous to the 17th November last; my cousin was precisely my height; he was shorter than either of the defendants; he was fuller and more rounded than Mr. Coburn, and perhaps of about the same height. Was at the house

of Mr. Coburn on the 17th November, about 1 o'clock in the afternoon, and received severe injuries there by Coburn and Dalton. Saw Sumner on the Thursday and Friday succeeding the 17th; he called my attention to the mark on his ear, and complained of a pain in his chest; saw nothing further on his head; merely noticed the discoloration on both of his ears; he was warmly clad for the season; had on a winter overcoat and a felt hat; one day when he came in he had a white handkerchief over his left eye; I visited Fera's shop once or twice a week for three weeks prior to the 17th.

Cross-examined: Had known Sumner for a long time; he made me a confidant; we went to the saloon sometimes by appointment with Mrs. Coburn and Mrs. Dalton. Was present at an interview between Mr. Stone and Mr. Sumner in my office; the subject of prosecuting Coburn and Dalton for the assault on Sumner was referred to; Mr. Buckingham and Mr. Merrill were present; have commenced a suit against Coburn and Dalton.

Rufus P. Sumner: I am father of Wm. Sumner; reside at Milton Upper Mills; am a farmer; William was 20 last September; he died on 11th of December last; my son came home injured on the 17th November; the eye was inflamed, the skin was broken, and it bled a little; he had a handkerchief over it tied around his head; do not recollect whether his eye was swollen or not; there was a distinct mark on his eye; there

was blood on his eye; the next morning the eye had swelled, and was of a dark red color; it grew darker in a few days, and appeared more like a black and blue eye; did not observe any other injuries on his person on the night of the 17th; his general appearance indicated that he was injured more than I knew of; he showed it by a loss of appetite and his spirits were not so lively as usual; in bathing his eye with camphor and other things every day for the first week; his mother and himself made the application; he made complaints of his stomach, face and left side of his neck; he complained of soreness in these parts; do not know anything about his vomiting; did not notice any mark behind his ear the first week; he nursed himself during that time; a week afterwards I saw a mark under his left ear similar to the mark under his eye; it was of a dark color like that of a bruise; the mark was about as wide as my finger, and an inch and a half in length; after he was injured he laid down in the day time on the sofa quite frequently, and sometimes in the evening.

January 28.

Rufus P. Sumner: Have no knowledge of my son taking cold after he was injured; he usually went out well clad and he never went out in extreme weather. My son never went away a great distance from the house, except once; he visited Boston once on Thursday the 22d November, at other times after he was injured he took his gun and went a short dis-

tance from the house to shoot some quail; was gone only a short time, perhaps half an hour; think it was a pleasant day; he also went out about an hour on Thanksgiving day; that is all the time that I recollect; he was well clad then, and had two coats on and had a handkerchief over his eye; he had on his brother's thick boots. Have no knowledge of his going out to kick football on Thanksgiving day; think he went to his aunt's in the evening of that day; she lives about half a mile from the house; he was warmly clad that evening; had on two coats and a woolen dress throughout. After he received his injuries his spirits fell off very rapidly; previously he was very cheerful and fond of amusements and singing; after his injuries I do not recollect of his taking part in any amusements; on Thanksgiving day he took no part in his brother's amusements in the house.

Cross-examined: When he went to Boston I told him that I thought he was not fit to go; he said that he must go in, and I told him to wrap himself up well and warmly. He had a bandage over his eye the first week; the second week he had it off some of the time; don't remember that he had a bandage on Thanksgiving day when he went out; do not know of any cause for the depression of his spirits except his bodily injuries; do not recollect that he ever said whether his depression of spirits was caused by mortification of mind or bodily injuries; the cause of his in-

juries was never a subject of discussion with me; I found that it injured his feelings, and did not make any allusion to it; after I found that something injured his feelings, both mentally and bodily, I abstained from speaking to him about the injuries; I had heard how he got injured.

Rufus W. Sumner: Noticed my brother William on the night of 17th, when he came home; it was dark all under the eye and around it; the skin was very much bruised, and the eye itself looked red; the bruise extended from the cheek bone up to the eye, and the skin was discolored over the eye; noticed that the left side of his face was swollen, and also his neck; all of the left side of his face appeared to be fuller than the other; the eyelids were much swollen compared with the other; there was a discoloration on the side of his throat; the next day I saw a mark on his ear; his lower jaw was discolored, and also lower down on the neck.

On the Saturday following noticed the whole rim of the ear and the back of it was discolored; it was of a dark blue color; he complained of his chest feeling sore, also that he felt sore all over. He was taken sick on Tuesday, and complained very much, and laid down on the sofa; he said that his eye pained him very badly, and that he felt sick; he took his bed on Wednesday; he died on the Tuesday following, about five o'clock in the morning; his spirits were quite different after he got injured; before, he took

part in everything that was going on; after, he did not join in anything; his general health previous to the 17th was very good; I do not know that he had any sickness for many years, except a lame knee; this was caused by a sprain and lasted about four weeks. On Thanksgiving day he went out to kick football; he went about ten rods from the house; he run a short distance to kick the ball, and I noticed that he stopped short, turned round and gagged, his face looked very red, and he then went into the house.

Dr. Christopher C. Holmes: Am a physician; saw William Sumner on the evening of Dec. 5th, last; he was sick in bed, and had severe inflammation on the left eyelids; they were so swollen as to require considerable effort to open so as to show the ball of the eye; a dark discoloration covered the lower lid the whole extent; it was of a yellowish brown color; he had inflammation on the left side of the neck, just below the lower jaw, also some on the left cheek, about midway from the eye to the neck; he complained of pains in the head, eye, and soreness in the chest; he was very feverish; under the usual treatment for inflammation, the next morning I found him less feverish; the inflammation subsided; the first day the inflammation of the neck was considerable. I saw him each day and thought him improving, up to Saturday; on Sunday I found him with severe inflammation of the throat, at times nearly causing suffocation; he was also de-

lirious. Monday, his throat was less troublesome, but his strength failed; in consultation with me, Dr. Miller of Dorchester, saw him on Monday night; he slept the first part of the night on Monday; was then delirious until a few moments before his death, which occurred about 5 o'clock, Tuesday morning; that is the history of the case up to his death.

Mr. Cooley: In your opinion, what was the cause of his death? Inflammation of the throat and air-vessels. Have heard the testimony in the case, and consider the external injuries the predisposing cause, and exposure the immediately exciting cause of his death.

What do you mean by saying that exposure was the immediately exciting cause? I do not know of any better means of expressing it than to say that I should have expected him to recover unless he had received additional injuries from exposure.

Do I understand that the original cause of inflammation in the throat was caused by inflammation of other parts and that these parts were affected by exposure? I think that the inflammation in the air passages was caused by the primary cause of inflammation in the throat and extended in consequence of the morbid state of the system and exposure to the cold. I consider the inflammation of the throat as one of the first causes of death.

What relation did the injury to the eye sustain to the inflammation which caused his death? I should think that it had

some relation to it, but not very much. I think that the inflammation of the eye had great effect upon the whole system. I wish to lay great stress upon the morbid state of the system.

Did you not regard the primary cause which produced his death, the external injuries which he received, and the exposure to the cold, the assisting cause? I think that he would not have had the inflammation if he had not had the beating. I cannot say that the beating was the original cause of his death, because it would imply that it was a sufficient cause. I say that the inflammation was one of the causes; it was primarily in point of time as one of the two causes which produced death; it was an assisting cause, but I cannot limit the amount of its assistance. I wish to be understood that there were two causes for the inflammation; the primary cause was the beating.

I understand you to say that in consequence of the beating an inflammation began; that subsequently, from exposure, the inflammation increased. Am I right, I wish to have it understood that the inflammation was getting better before the exposure and the last attack came on.

Before the last attack he was getting better—and now where do you bring in the exposure and morbid condition? I consider his coming to Boston and walking so far on Thanksgiving day as imprudent for a man in his condition and that the exposure was dangerous.

Cross-examined: Was present at the post-mortem examina-

tion. The opinions which I have expressed were confirmed by Dr. J. B. S. Jackson of Boston. The external injuries of Sumner were not adequate to cause death, but I do not think he would now be dead if he had not been beaten. The morbid condition and exposure were the existing causes of the inflammation. The post-mortem examination disclosed an ulcerated sore throat. In the absence of other causes testified to, I should have been satisfied that the death was caused by an ulcerated sore throat; by exposure.

January 29.

Mrs. Sumner: Am the mother of William Sumner, deceased. His general health for several years prior to 17th November last was good; he had complaints like other children in his infancy, as measles, whooping cough, etc.; he did not have any sickness which left a serious injury. He came home on the evening of 17th November last and his eye was then very much bruised underneath; the skin was broken and swollen. Noticed his throat was swollen but did not notice on which side it was, as his eye was so bad. Noticed a red mark on his throat, but not much. Did not see any particular mark upon him except his eye; noticed that he did not sing or talk much and he complained of his stomach; noticed that his ear had a dark spot on it. He said that the back and top of his head was sore; that his chest was sore. I laid poultices on his stomach. He came in one day and I saw him at the sink and he gagged. He then

went upstairs and I went to the sink and saw some blood there that he had thrown up; I saw him do this several times; when he vomited he placed his hand upon his chest. Have no reason to suppose that he took any cold after the 17th November. He always went out warmly clad. He had the scarlatina about fourteen years ago. I was not aware that it left any injury on or about his throat. He never expressed any grief or mortification at having been concerned in any transaction; it was not a matter that was talked of in the family; there was no reproof or harsh words uttered to him to my knowledge. Did not hear him complain of a sore throat until he was confined to his chamber on Sunday, Dec. 2. Am not aware of any exposure that he was subject to that made him liable to take cold; he practiced bathing in cold water and was not liable to colds.

Cross-examined: He did not complain of a sore throat to me until Sunday, December 2; he did to some of the family; did not know at the time that he went out to play at foot-ball; he was not gone from the house long at any time; I cautioned him about going out lest he should take cold.

Luther A. Ham: Arrested Mr. Dalton on the morning of the death of Sumner; found him at his store in Congress street and said to him, "I shall be under the necessity of arresting you; Mr. Sumner is dead." "You don't say; it can't be possible; he has been out gunning."

Said that he did not kick him and that all he done was with

his hands; said it was a very unfortunate affair by the course they took in getting him at the house; that if they had flogged him in the street the public would have sustained them. I or any other man would have done the same in like circumstances. He said, "We made a great mistake in decoying him to the house."

George M. King: Went to Mr. Coburn's house on the 11th Dec. and arrested him; I told him that Sumner was dead; he said he saw something of the kind in the papers the day before, and thought of calling on the Chief of Police; he asked if Dalton was arrested, and I told he was; he said "this affair belongs to Dalton more than it does to me."

J. B. S. Jackson: Am a physician and have practiced 24 years; conducted the *post-mortem* examination on the body of Wm. Sumner, on the day of his death. (The witness described the results at length.)

Mr. Cooley: What is your opinion of the cause of his death? Inflammation of the throat and air passages.

Judging from the testimony introduced in the case, and from the *post-mortem* examination, what was the cause of the inflammation? From the *post-mortem* examination it was impossible to tell the cause of the inflammation. From what I have heard testified to I believe that we must look back to the injuries which he received as the cause of his death. These injuries were severe, external and internal. There was also a mental as well as bodily injury; but from such injuries

one would have expected, in the natural course of things, that he would have recovered. It is not impossible, however, that disease may have arisen spontaneously, so far as we could see and know of the cause and effect of his injuries. This is not impossible. I have heard causes, however, testified to—the gunning, kicking football, and the visits to the aunt's,—and though they were slight, I don't doubt that they would have assisted in inducing inflammation or disease. The gunning and visit to his aunt's showed that he was not in a condition to do either. The evidence shows that in kicking football he tried it as an experiment, and failed. He also went to his aunt's against his will. I agree with Dr. Holmes, that if he had not been beaten he would still be alive. I believe that his exposure assisted in producing his death.

Which was the original cause of the inflammation? The beating was the original cause, in point of time. The left eyelid was very badly bruised, and he bore the mark of it to his death. At the end of a fortnight that eyelid became inflamed, and then, or very shortly after, the cheek and neck on the same side. He was getting better of this inflammation when a further in-

flammation of the throat showed itself, and it was that which immediately caused his death. The cause of death was ulceration of the throat and the air passages, as I have testified before.

What effect did the mental and moral causes have in causing his death? They operated in producing it, but in what proportion I cannot say.

To Mr. Dana: My opinion in regard to the cause of his death is founded upon the history of the case. If it should appear that there was more exposure than has been testified to, it would alter my testimony. If it appeared that he stood in the cold with his hat and coat off for a half hour and the time that he did so, it might change my opinion. I do not think that the injuries which Sumner received were of themselves sufficient to produce death. I do not understand he ever recovered from his injuries; but his death might be explained upon another hypothesis than the evidence of external injuries.

To Mr. Cooley: I attribute his death to violent injuries and other causes. The external injuries assisted by, but not to any great extent, the exposure, caused his death.

Mr. Parker said that he felt thankful that Mr. Dana was to make the closing argument for the defense, as he believed that the younger men should do the work. He, like the District Attorney, hoped that the jurors would judge the case impartially. The grossest and basest calumnies have been circulated by the press in regard to the conduct of the clients. The columns of the press are not a legal tribunal, and *ex parte* statements by the press are not to be taken by the jury as evidence. Even now the jury had not heard the case for the defense, and it is very important that the

jury should have no bias. He believed that the jury was an impartial one, and he was willing to entrust the case to them.

In regard to the press, the public had a morbid appetite to hear everything connected with a case like this; but the press should not administer to this prurient curiosity. Sums of money may have been paid to show false *ex parte* statements in the columns of the press, and it is therefore extremely necessary that the jury should not be biased by any statements made by the press.

The parties were arrested without any process; taken before a Court where it was stated that the Court could not distinguish between manslaughter and murder. They next went before a Grand Jury, and there the crime was proved not to be a malicious one, and they were admitted to bail, and have now come to trial.

We now expect to show that letters were written by the ladies, and sent at the same time to Porter and Sumner, and it was expected that both would arrive at the house at the same time, when it was the object of the defendants to confront them with their wives and demand an explanation of their conduct, and with some reproof it was the intention of the defendants to let them go. But it so happened that Sumner did not receive his note, and the defendants went in search of him, and found him in the saloon, from which he went to the house without the use of any force. Mr. Dalton did not know Sumner when he met him in this saloon. After they took him to the house and brought him into the presence of the ladies, it was found that Sumner had a ring on his finger which, six months before, had been placed on the finger of Mrs. Dalton, at her wedding, by her husband. Other circumstances of guilt were revealed, unexpectedly, to Mr. Dalton, and these so enraged him that he attempted to whip Sumner in the room, but his resistance and that of the females prevented him from carrying out his purpose, and Sumner was therefore taken down stairs and chastised, and then made to leave the premises by the fence of the back yard. If you are husbands or brothers, you can understand the feelings of these young men, whose wives had disappointed them, and as the Court has ruled that we cannot show the amount of the provocation, we must appeal to you to place yourselves in the situation of the defendants when they chastised Sumner.

In this case the evidence shows that it was an involuntary homicide. The defendants expressly stated that they should only use their hands, as they thought Sumner was not so much to blame as Porter. If they intended to murder him they might have taken him out of town and beaten him to death, and no mortal arm could have prevented them. But they did not wish to chastise him severely, and we are prepared to prove that Sumner himself said that he got a slight beating for his improper intrigue, and that it was not so bad as Porter had received. There is no proof that any instrument, or cow-hide was used. There is a great difference in the testimony in regard to the expression "Oh don't, you'll kill me or him," but it is most probable to suppose that the exclamation was

made by one of the females, and that she said "Oh don't, you'll kill him."

We contend, in view of the testimony in regard to the amount of flogging, and the exposure afterwards, that the defendants are not guilty of any homicide. Mr. Parker then read several extracts from Greenleaf in explanation of the several degrees of evidence which sustain a charge of manslaughter. He contended that the Government must prove that the death was the natural, usual and probable result of the beating. The District Attorney had asked Dr. Jackson if the death of Sumner was the natural and probable result of the beating, and he gave a negative answer. When the evidence only proves that the death was accelerated by the beating, it does not sustain the charge of manslaughter. If two causes co-operate to produce death, and the defendants were only guilty of one cause, then the charge is not sustained. It is testified by Drs. Jackson and Holmes that Sumner was recovering until he exposed himself; and this was the second cause. He would have recovered from the beating had he not exposed himself; and therefore the defendants cannot be held responsible for his death; and so the court will rule to you. A mere predisposition to disease, caused by beating, is not sufficient to sustain the charge. The physicians testify that the beating was not sufficient to produce the death. Because he exposed himself and his mental depression brought about a second attack of the inflammation, and the beating only accelerated the disease, then the death ought not to be attributed to the beating. We have physicians who have examined the record of Dr. Jackson's autopsy, and who differ from him entirely in regard to the cause of Sumner's death. Medical testimony has great effect, but medical men are very apt to form contrary opinions, and none of them are infallible.

In regard to mental depression, it may be caused by a fear of an exposure of the disgrace that a man brought upon himself by an improper course of life. We expect to prove to you by the evidence that Sumner took a ride alone with Mrs. Dalton on Friday, Nov. 10; that when Mrs. Dalton returned, her conduct was exposed and the matter discussed, and a resolution made to invite Porter and Sumner to the house the next day, when an interview was to be held between the two husbands, the two wives, and the two lovers, and an opportunity was to be given the two lovers to explain their conduct. The interview was sought for to obtain explanations, and circumstances revealed in regard to the marriage ring and other matters, which I cannot reveal, were of such a character that Mr. Dalton was justly outraged and attempted to chastise Sumner on the spot. He took refuge behind one of the females, and had to be taken from the room. We can show that he got away and ran to the fence, and fell over it. We have also proof that he was in town on the 30th November, and pawned his watch and did some other business, and gave an account of his flogging. We have a letter to show that Sumner was sent for on Saturday, at 11 o'clock, which letter he did not receive. It was then found out that he had

made an appointment to meet Mrs. Dalton at Fera's saloon in the afternoon, and the defendants went there after him. When they got him to the house he went to Mrs. Dalton's room with Mr. Dalton; Mr. Coburn did not go in at first. The scene with the two women and the flogging followed. Now, if he had a good character before, the public exposure which followed ruined it, and must have caused a great mental depression. The compunctions of his conscience must have created a great mental depression, and his sufferings were mental and not corporeal. His father says that the family avoided all allusions to the affair, because he seemed to be mortified when the subject was mentioned. This great mental agony must have made him extremely sensitive to atmospheric changes. He imprudently exposed himself, and was the cause of his own death.

It will be enough for us to show that the wounds which he received were not adequate to cause death. We shall show that the wound which he received in the eye would have got well in a fortnight, had not mental and other causes supervened. The intervening cause was the sore throat, produced by his imprudent exposure, and therefore the beating was not the cause of his death. We have some medical testimony to offer which will show that the beating had no connection with the cause of his death.

If the beating is disconnected with the cause of death, then the defendants must be acquitted. If doctors of equal ability and truth disagree, who shall decide? You are not medical experts, and must have it proved to your entire satisfaction that the beating was the cause of death.

We may show many things to alter the opinions of the physicians who have testified for the government; and until all of the testimony is in, an opinion should not be formed upon the medical testimony. The jury must be satisfied that the death of Sumner cannot be explained upon any other hypothesis than the evidence of his injuries received, before they can find the defendants guilty of his death.

Mr. Parker said the defense would not prolong the case more than could be helped, as he nor the jury would like to spend the Sabbath in the Court House.

THE WITNESSES FOR THE DEFENSE.

J. O. Mason: I am a builder, and have examined the premises of Mr. Coburn, 84 Shawmut avenue, and made a plan of the same. The plan was introduced and shown to the Court and jury as a correct one.

J. S. Ellis: I am a specie broker in State street. (Witness

was shown a paper which he said he had seen before.) I bought a watch and that paper is the bill of sale written by me, with the exception of the signature. It was written on the last day of November or the first day of December. The transaction took place in my office and was signed in my pres-

ence. Did not know Sumner at the time and have never seen the man who signed the instrument since the time; the man who signed it was a young one, about nineteen years of age.

About that time a young man came into my office who had a mark under his eye. (Witness produced the watch which he bought at the time the paper was signed.)

Mr. Dana said that the paper was put in to show that the person who wrote the signature upon it was in the city at the time, and as the paper bears the signature of Wm. Sumner, he thought that they ought to be allowed to prove that he was in Boston at the time, by such evidence as they could command, viz:—the paper, the watch and the description of the party who signed the paper and sold the watch.

THE COURT said that if the paper went in it would amount to a declaration of Sumner's, and was therefore inadmissible.

Mr. Dana said that he did not want to put it in as a declaration, but as an act of Wm. Sumner's. The government may object to the evidence of the act, but they did not wish to prove the declaration in the receipt.

THE COURT said, that looked at in this light, it presented a different point, and the signature might be proved.

Mr. Cooley said that if the signature was proved, and not the date, the paper proved nothing in regard to Sumner's being in town at any time. The simple fact of it being proved his signature did not prove that he was in town at any time.

THE COURT ruled that the signature might be proved.

Edward Sumner: (Witness was shown a watch.) Am a brother of William Sumner, now dead; he used to wear a watch similar to the one now shown me. He did not have that watch about him during the last week that he lived; brother said it was sold before 17th November. Never saw the watch on him after he told me. I testified in the police court on the examination of Coburn and Dalton, on the subject of kicking foot-ball. I cannot tell how many games were played; think three or four—we chose sides and my brother William was chosen on the side that I was; it was after dinner; we might

have played a quarter of an hour or more. William went into the house before I did; I played five minutes after he left the field. Only saw William participating in the game once, when he ran down the hill adjoining the house. Saw him come back, put his hands on his side, turn red and then go into the house. The weather was pleasant that afternoon, but cannot state whether it was cold. Was told that my brother went gunning, but did not see him. I went to my aunt's that night. I rode back with my brother William; we played cards at my aunt's and William

took a hand at cards; think that he did not play checkers.

Cross-examined: Was at the Parker House about the first of November. Met my brother on the steps of the Merchant's Exchange; he exhibited some money to me that day, but I do not know the amount. Did not see the watch after the 31st October until I saw it in the broker's office after the death of my brother.

J. Andrews: Am reporter of the *Times*. Saw William Sumner at Mr. Porter's office on November 22; noticed nothing but a mark under his eye; it had the appearance of a common black eye about recovering. Some person asked him how he felt and I think his reply was, "I feel pretty well." I did not hear him make any complaints about his injuries. Went there to obtain information in relation to the Shawmut avenue affair. I asked as many questions as I thought he would be likely to answer. He was chatting and laughing most of the time; his general appearance was that of a person in good health, with the exception of the mark under the eye.

January 30.

Isaac W. Hart: Saw William Sumner on Thursday, 22d November in the forenoon; came to my house; went with him to Dorchester Lower Mills. We rode about five miles. Saw him again next week in the field near his father's house; it was in the forenoon and he had a gun. He had a mark upon his face when he rode out—under the left eye.

Wilder Broad: Knew William Sumner; saw him at my house

the night before Thanksgiving; he came with his brother and helped cut up a pig in the shop where I do carpenter's work and keep some of my carriages. He staid there about an hour and took an active part in cutting up the pig. The weather was not very cold. He went home about twelve o'clock. There was no fire in the room when the pig was cut up.

Cross-examined: Do not think that William Sumner took any cold at the time; I didn't. He wore no gloves while he was cutting up the pig. I cannot tell how he was dressed. There was a stove in the room, but I know there was no fire in it. He attempted to sing while he was at my house, but he did not go through with it. Did not hear him make any complaints. Saw a mark on his person.

Horace Broad: Knew William Sumner; saw him at his house on Thanksgiving Day, about twelve o'clock. Turned a grindstone for him to sharpen a knife, about twenty minutes. He used water on the stone; there was no fire in the shed. Saw him again a little before two and I kicked a football towards him and he kicked it back again. He then went into the house but came out again after two. William kicked the football once; he ran about five rods and hit the ball first; had a little tussle with him to get the ball; he finally got it from me.

Gridley Coburn: Am brother of the defendant, Edward Coburn. On the 17th November last I carried a message to Mr. Porter and also to Mr. Sumner from my brother.

Mr. Dana argued that the evidence in regard to sending these letters to Porter and Sumner at the same time, went to show that they were not decoyed there to be beaten separately, or that the defendants intended to take any unfair advantage of them. He thought that the letters went to show the state of mind under which the parties acted.

THE COURT replied that the only material evidence in the case is that which describes the assault and its effects. It is not material to show whether malice existed or not.

Mr. Dana said he thought that every thing which did not refer to malice aforethought had a tendency to show the minds of the defendants and the amount and kind of beating which they inflicted on Sumner. He contended that legal malice existed in cases of manslaughter, or else there was no criminality; therefore the amount of legal malice or criminality is allowed to be shown by the defense under the ruling of Judge Story.

THE COURT ruled that interrogatories in regard to the letters referred to and their character were clearly inadmissible. In cases of assault and battery, no words are adequate as a provocation to justify the assault; no man has right to execute his own wild notions of justice when he is provoked by words. It is immaterial to show for what purpose Sumner was taken to the house, or whether he was decoyed there or not.

Adeline Coburn: Am sister to Edward O. Coburn. Live at 68 Shawmut avenue, at my father's house. Mrs. Coburn is called "Fanny" and Mrs. Dalton, "Nelly." Mrs. Dalton is about eighteen years of age and was married last summer. I was at No. 84 Shawmut avenue on the 17th November last, in the morning.

Mr. Dana: When did you first know about any difficulty between Mr. Dalton and Mr. Sumner? (Objected to.)

Mr. Dana said that he proposed to show that witness knew nothing about the affair until that morning and that she was called in to assist in bringing about a reconciliation.

THE COURT: *Mr. Dana*, I will not allow any questions of the kind to be asked. I will not allow the forms of law to be played with any longer. I do

not wish to have you, *Mr. Dana*, ask questions for the purpose of arguing them to the Court.

Mr. Dana said that he had an infirmity in not being able to make himself understood.

THE COURT: I do not know that the Court has shown any infirmity in its ruling, and the two last questions are ruled out, for the present, at least.

Miss Coburn: Was at the house when Mr. Sumner came there; in the front room, in the third story. Mrs. Dalton was there at the time but she did not live there; she boarded at a house in Summer street. Mrs. Coburn, Mrs. Dalton and myself were in the room. I knew that Mr. Sumner was coming; was at the window when the carriage came. Had never seen Mr. Sumner before; when he came in I went out of the room and down the front stairs to the

story below; then went back to my chamber before the gentlemen came upstairs. Mr. Dalton and Mr. Sumner came into the room where Mrs. Coburn, Mrs. Dalton and myself were; Mrs. Coburn did not enter the chamber with the gentlemen.

Mr. Dana: Will you now state all that took place in the chamber? (Objected to and ruled out.)

What did Mr. Dalton do when he came into the room?

He introduced Mr. Sumner to his wife. Mr. Sumner offered his hand and said, "How do you do, Nelly?" The parties then sat down; there was some conversation then between Mr. and Mrs. Dalton and Mr. Sumner. Inquiries were made by Mr. Dalton of Mr. Sumner and Sumner made replies. I then left the room and was absent a few minutes; I returned and found the two ladies and three gentlemen in the room. When I went in the ladies were screaming; Mr. Coburn and Mr. Dalton were not then doing anything

to Mr. Sumner; he was standing in the front part of the room; Mr. Coburn and Mr. Dalton were not near him. Mrs. Dalton screamed murder and opened the window. I shut down the window; at that time nothing had been done to Mr. Sumner. I closed the window because I did not wish to have the neighbors hear her cry. I saw no reason for her making the outcry of "murder." Mr. Sumner was then asked several times to go out of the room. He went out with Mr. Coburn and Mr. Dalton; before this Mrs. Dalton fainted and I went after some water for her. Mr. Sumner did not make any outcry in the room. Coburn and Dalton were at the door; they had no weapons in their hands, and had not threatened him with any violence at the time; they told him to leave the room several times; he did not make any motion to go towards the door at any time when he was ordered to leave the room; the last that I saw of him he was standing at the foot of the bed.

Mr. Dana asked leave to interrogate the witness in regard to the questions and answers which she heard in the chamber respecting the punishment to be inflicted, as tending to show the minds of the defendants and the probable amount of punishment they would inflict, and whether they did not use more violence than they otherwise would if Sumner had left the room when he was ordered out.

THE COURT said that the jury would be instructed what amount of force a man can use in expelling a person from his house, if the person refuses to go until force is used. If the defense wished to show that what was done in the room was excusable, and a friendly or amiable state of mind existed between the parties while in the room, such evidence might receive some consideration. But as nothing of the kind had been mentioned in the opening argument of the defense, or was now proposed to be shown, it was not a pertinent inquiry.

Mr. Dana said he did not wish to show that the parties were in a judicious state of mind at the time of making the assault, as it

would imply that they had a preconceived determination to make the assault. He only wished to show that, from the frame of mind that the defendants were in they had no avowed purpose in making the assault.

THE COURT ruled that the testimony in regard to the state of mind existing when the assault was made did not mitigate the force of the assault, and was therefore immaterial and inadmissible.

Dr. F. S. Ainsworth: Am a jurisprudence; have attended practising physician and surgeon in Boston; have been a this trial and have heard the demonstrator of anatomy for whole of the testimony; have several years at the college in read the autopsy of Dr. Jackson; this city; my attention has been at the request of counsel for defendants called a good deal to medical

Mr. Cooley objected to the admission of the copy of Dr. Jackson's record of the autopsy. He also made further objections to it as being merely the minutes of the autopsy, without any opinions expressed; and as Dr. Jackson was present at the autopsy he was more competent to express a correct opinion than Dr. Ainsworth, who was not present.

Mr. Parker said it was a proper document to base a scientific opinion upon, as it is usual in such cases.

THE COURT—I think it desirable to exclude the document, if possible. It is a partial document, by whomsoever made, and it has been passed round among the hands of experts, who would be likely to draw partial inferences from it, as they could not have seen what Dr. Jackson did. I never heard of a case in which a record of an autopsy was admitted as evidence, and great care should be taken in establishing a precedent.

Mr. Parker said it had been identified by Dr. Jackson as correct, and it was now introduced as memoranda upon which the opinions of Dr. Jackson were based.

THE COURT: It appears to be nothing but a memoranda, and might be used by Dr. Jackson to refresh his memory. I do not see how it can be used by an expert to base his opinions upon. The testimony of an expert must be based upon the legal evidence in the case, and the record of the autopsy must be ruled out.

Mr. Dana: Supposing the facts testified to by the medical gentlemen to be true, what, in your opinion, was the cause of Mr. Sumner's death?

He died of inflammation of the throat and of the air passages leading from the throat to the lungs.

Supposing the same facts to

be true, did or did not the inflammation of the throat and lungs furnish an adequate cause of death?

I think it did.

Supposing all the testimony to be true respecting external injuries and taking all the evidences of appearances before and after death, in your judg-

ment, was, or was not, the external injuries the usual, ordinary or probable cause of death?

I think it was not; I think you could not predicate death upon the injuries he received. In this case I have made up my mind that the patient was recovering; there is no pause in nature, the patient must either get better or worse; there is no evidence in this case that the patient was any worse a week after he received the injuries, and I infer from the facts that he walked and rode out, he was getting better; while this process of recovery was going on he exposed himself to great vicissitudes of climate, and under such circumstances it is not improbable to suppose that even a well man might suffer; his exposure on Thanksgiving day and the day after was such as to produce the results described by Dr. Holmes as having been seen Dec. 5; this exposure affected the parts weakened by previous injuries, from the effects of which he was recovering; I see no immediate or adequate cause for the state of his health Dec. 5, except the exposure; I see no cause to have prevented his recovering before Dec. 5 except the exposure; I include both mental and physical injuries operated upon by exposure; I cannot give the proportion between the mental and physical injuries which produced his state of system; I think mental causes operated in producing his state of system; his mental depression, if assumed to be true, would operate upon the body in such a way as to render it more susceptible to the invasion of

any disease from without; added to the invasion of disease it would depress the powers of nature so much as to render a fatal termination of the disease more probable.

Cross-examined: The effect of Sumner's injuries were in process of recovery the first fortnight, and then they retrograded in consequence of his exposure; the most probable effects of the injuries were to enfeeble those portions injured, and determine an inflammation arising from other causes, or any disease, to those parts; inflammation from a blow is caused by an effort of nature to restore what is destroyed by the blow; the inflammation of the throat was only caused by an effort of nature to restore the throat to a state of health. I attribute his death to the three causes named, and one of which I am not now cognizant; I cannot say that Sumner would probably be alive to-day, if he had not received any external injuries; he would have been much less likely to have suffered from exposure if he had not been beaten; I see no cause for his condition Dec. 5 except the exposure acting upon the effect of the injuries received on the 17th; there must have been some intervening cause to produce the state he was in Dec. 8; the external injuries were an assisting cause of his death; I cannot say that the external injuries were a necessary cause, as I have not formed my opinion.

Dr. H. G. Clark: I have not heard all of the testimony in the case; I did not hear Dr. Jackson's testimony, and only a part of Dr. Holmes'. In a neigh-

borhood where fever and inflammation of the throat existed, I should find them an adequate cause of death; external injuries are not the common causes of such diseases, and I should not look for them. Think external injuries did not produce the effects described. The external injuries would have no immediate connection with the sore throat, and only so far as they made the party liable to the attack, by prostrating and debilitating the constitution.

Cross-examined: The moral effects of injuries differ very much in individuals; should not give so much importance to the evidence of mental depression, so far as I have heard it, as to the physical effects of the injuries; think the physical injuries would make him liable to disease from exposure to the cold; the external injuries were not the most important agency in producing death; the sore throat arose from exposure, and was, by no means, the result of physical injuries. Assuming that Sumner was a healthy man before 17th November, the probability is that he would not have had a sore throat if he had not been injured externally; but for the injuries he received I think that he might be alive now.

To *Mr. Dana*.—The external injuries put him in the range of the attacks of sore throat; mental depression would operate to produce a state of system that would make him liable to an attack by disease.

January 31.

Dr. C. H. Stedman: Have practiced many years in this city at the U. S. Hospital, the City Hospital, and the Institu-

tion for the Insane; have heard very little of the evidence in this case. Delirium would more quickly ensue when the throat is inflamed, because it throws the arterial circulation to the head; expectoration of blood is not unusual in cases of sore throat. Such a case of inflammation of the throat as described I have never known to be caused by external injuries. In cases of cold and the liability to take it, something depends upon the natural state of the system, but I cannot tell how much without some data. A mortification of the mind would depress the vital energies and exhaust the nervous system. Very few hours are sufficient to produce an effect upon the body by a depression of the mind; grief and fright are causes which produce these changes; the case of the "Prisoner of Chillon" is one instance that occurs to me; if the *post-mortem* examination shows no transmission of inflammation from the parts injured, through the mucous membrane to the throat, it would confirm my opinion that the external injuries had no effect in producing death; I never heard of a case where inflammation is transmitted from one part to another by the mucous membrane; I should not be able to conceive of such a case where the inflammation of the eye could be transmitted to the mucous membrane of the throat, unless the throat was crushed, and then death would be likely to ensue.

Cross-examined: I never knew of a case of sore throat like the one described produced by external injuries; it is much more

likely to proceed from atmospheric changes. Should consider external violence that weakened the system a predisposing cause, and exposure the exciting and approximate cause of the sore throat; do not regard external violence as a cause for depression of spirits any more than from any disease. Moral causes are difficult to estimate in their effects. In a case like Sumner's I do not see sufficient physical cause to depress the spirits, but I do see sufficient mental cause. A man may come off victorious in a *melee* and yet have cause to be ashamed of

himself. In a case like the one supposed I should not consider the external injuries sufficient to produce delirium.

To Mr. Dana: The external injuries, without the disease of the throat were not sufficient to produce death. Should not look for a transmission of inflammation from one tissue to another in a different part of the body. I never knew of the transmission of inflammation from one tissue to another in a different part of the body. Never knew of the transmission of inflammation except in cases of gout and rheumatism.

Mr. Dana said that one feature of the case to be argued to the jury would be the medical question whether the sore throat was not the immediate cause of the death, and whether this sore throat was not caused by exposure and the morbid condition of the body produced by mental suffering. He wished to show that the morbid condition was caused by the mental and not the physical condition of Sumner. The government have attempted to prove that the morbid condition was caused by the physical injuries. The defense contended that the morbid condition was caused by mental depression and while in this morbid condition, produced by mental depression, his exposure produced the sore throat, of which he died. He thought that the defense had a right to show how far the mental depression acted as a co-operating cause; and for this purpose he wished to introduce testimony to prove that the mental depression must have been very great. The government had contended that there is an adequate physical cause for death, supposing there was no mental depression. The defense wished to show that mental depression must have been a powerful co-operating agent in weakening the system; and to prove this they wished to introduce evidence of what transpired in the chamber at Coburn's house—letters, and other facts of equal force and pertinency.

Mr. Cooley said that this evidence had been ruled out several times, and still it is brought up again. It is not to be offered to prove that the charge against the defendants is true or false. It is only put in to show that it might have a tendency to establish a state of mind. Such speculative evidence is not admissible. Unless they can show the deepest mortification of mind, like that of a person who loses the accumulations of years at one blow, then the evidence is only inferential in regard to the amount of grief or shame which was produced and existed. This much is a clearly settled principle of law that if a party is assumed to be guilty of

adultery, and he is killed, the provocation is no justification of the killing. The testimony is therefore not admissible.

Mr. Dana said that *Mr. Cooley's* objection was only to the amount of mental depression to be proved, and he therefore yielded the whole question as presented by the defense. In *Greenleaf*, sec. 102, the same principle is laid down that it is competent to prove the amount of mental depression which co-operated to produce a state of the system which predisposes a party to contract a fatal disease. The evidence which he wished to introduce would tend to prove that the mental condition of *Sumner* did operate to produce a physical prostration and invited the disease of which he died. Because the government had the first chance to prove the physical condition, they have no right to shut out other testimony in regard to the mental condition. Because they say the death was caused by physical violence, they have no right to prevent us from showing that mental depression had its effects in causing death. Mental depression is a legitimate cause of physical prostration, and because the District Attorney says that if a man's honor is destroyed, and he afterwards receives a slight blow, and subsequently dies, the man who struck the blow should be hung for murder, he did not hold it to be the law of any civilized nation.

THE COURT stated that in view of the various aspects under which such testimony would present itself, the modes of rebutting it, by newspapers and the conduct of the females, and of sustaining it by a thousand things, perhaps some of them as remote as the fall of *Sebastopol*, he could not allow it to be introduced. It would be too difficult to distinguish what effect the various causes had in producing the morbid condition of the body, and the testimony was therefore ruled out.

MR. DANA FOR THE DEFENSE.

Mr. Dana asked leave to prove that the flogging of *Sumner* was a public rumor at the time or soon after it was committed. The Court ruled it out and exceptions were taken.

Mr. Dana asked if he could be allowed to show *Sumner's* statement, not written by himself, but published as his statements of the transaction in *Shawmut avenue*. He did not wish to show what he stated, but the article which was written upon the statements made by him. The Court ruled it out as inadmissible. *Mr. Dana* then stated that he had no other evidence to offer.

REBUTTING TESTIMONY.

Dr. J. B. S. Jackson: I would change my testimony so far as this, that the amount of exposure is greater than I supposed, and that he would be more liable to be attacked by

disease in the condition that he then was. My opinion is the same that the injuries were the predisposing cause of death, and that he would be alive now but for the external injuries.

February 1.

Mr. Dana: In the gospel according to St. John, it is written, "Judge not by appearances, but judge by righteous judgment." Time was when arrests, trials, sentences and executions took place between the rising and setting of the sun, and it was only by taking refuge in the sanctuaries of the church that persons had an opportunity of being heard. But in our days, Justice sits in her own temple and pronounces righteous judgment. I do not know of a case that demonstrates the difference between ancient and modern trials more forcibly than the case now before us. In ancient times such a case as the one before us would have been settled in a manner that may easily be supposed by you. Now, the case has been delayed until every person has had a sufficient time to calmly receive the facts in the case and form a proper judgment. We have not been allowed to present certain evidence which proves the amount of provocation in this case, but you, gentlemen, are not to suppose that there was none. And on the other hand, you are not to suppose that there was no provocation, nor assume that the deceased was decoyed to the house, because we have not been allowed to prove that it was otherwise. Only one witness has stated that the defendants did use the word decoy, but we could, if allowed, show that the intention was to have the deceased at the house when another party called.

You are not to assume either that the defendants inflicted a severe chastisement for a very slight cause, because the newspapers, and even a higher authority, has called it a mere flirtation between a woman and a young man. We could, if allowed, show a different state of facts, and therefore you must not assume that the provocation was slight. You are not to assume that the acts committed were done after deliberation. My clients have not had a hearing upon this question, and I hope you will not do them the injustice to suppose that they proceeded calmly and coolly in the infliction of chastisement upon the deceased. If, in the case of Sumner, they called him to a room, and then the develop-

ments of his acts and the infatuation of a silly woman, made them suddenly resolve to punish him, they cannot be presumed to have had any deliberate malice.

Mr. Dana then recapitulated the acts and the appearance of Sumner from the time of the assault up to December 5, as presented by the evidence, and asked if his death could be attributed to the assault upon him.

Even the physicians, and they the most skillful, have said that the injuries were not the cause of death. Had all the facts which have been presented during this trial been spread before the public through the columns of the press before the trial, public opinion would have been much changed, and perhaps the arrest and trial of my clients would never have occurred. The deceased, as shown, never intended to prosecute the defendants for any assault, nor did any of his friends advise him to do so. Had the press published these facts instead of catering to a prurient appetite, who can say how much the aspect of affairs would now be changed? But we are not to suppose what would be the condition of things under different circumstances, but take the facts as they are presented, and upon them found our judgments; and therefore I shall confine myself to the testimony.

In the early summer of 1855 *Mr. Frank Dalton*, then a very young man of 22, was united in marriage with *Nelly Gove*, then of the age of about 18. Dalton was a man of unimpeachable character, engaged in business, looking forward to the building up of a character in the community by temperance, by chastity, by fidelity, by business capacity, by attention to, and the faithful discharge of, the duties of life, hoping for peace, comfort and happiness, where young men place that hope, in their domestic relations. He promised fidelity, leaving all others to adhere to her alone to comfort and cherish her to his life's end; and that promise on his part he has kept and performed.

In less than five months thereafter, a cloud is cast across his way in life. He finds himself in the cell of a felon, charged with the crime of murder; arrested while engaged

in business, with no more idea of escaping justice than justice had of escaping him; before any complaint had been made, before the *post-mortem* examination had taken place, which would have shown the cause of the death, he was arrested by an officer and dragged to prison, and for weeks not bailed—the law not providing bail until he could be examined by a grand jury—among the worst of criminals and murderers.

Not only so, but the press was seized upon by those who were opposed to him, to cater to the public, excited by that prurient curiosity which seeks to pry into that which may gratify a morbid fancy or taste. Everything operated against him, while he was advised by counsel to wait till public opinion could subside to its proper level. But there was a state of things still harder to bear. A person may bear confinement in a prison, but to be a mark for “the hand of scorn to point its slow unmoving finger at”—all this he had to bear in silence and with patience. He has looked forward to an hour like this.

He is disappointed, to be sure, in the degree of the investigation; but still, to its extent, he is satisfied. The time may yet come, when a further vindication may take place than the rules of law admit here. Why, gentlemen, has this taken place? Death, gentlemen of the Jury, is common. To the reflecting mind, death would seem to be the rule and life the exception. Of those who are born into the world, how few survive infancy, and of those how few reach manhood, and how very small the proportion of those who reach old age.

This frame of the human body, through which all the work of a world is to be done, which holds the mind, the intellect, and the spirit—which governs creation, and has dominion over the animals, and over the world,—is the frailest and the most uncertain of all things—more frail, even, than any work of man. Only a miracle carries it beyond a certain period, and it may break at any time. One single cause may produce death: it requires a combination of

causes to preserve life. Instead of its being extraordinary that a man should die, it is very extraordinary that he should live.

Well, here, among the hundreds of thousands who die daily, from various causes, in Milton, on the 11th day of December, died Wm. Sumner. He died, as every physician has said, from an ulcerated sore throat and inflamed passages. Every physician called by the government, or called by us, has testified that that was the cause of the death. That testimony, uncontradicted, is, that it was the natural, common, and adequate cause of death. Not only so, but the physicians have all said that they never knew such a state of things as existed in this case to follow from external violence. Never, never. If that state of things was produced by external violence, it is the first case ever known, says Dr. Stedman, and it cannot thus be accounted for. Since the world began was it not heard that a man died the cause of which Wm. Sumner died, resulting from violence. In our climate, the most fickle of any in the world perhaps, diseases of this kind, on the sea-board of New England are common, and death is the common result. In such a climate and at a season when the weather was most changeable, sometimes warm like summer, and then chilly like winter, at a time when the place where Wm. Sumner lived was visited by a miasma, producing scarlatina, he was taken sick and died. He died of that cause.

Well, gentlemen, what is that to us? No persons have more cause to regret that death today than my clients. For had Wm. Sumner been living today no complaint of any kind would have been brought against these defendants. Not even in his dying declarations did he utter a word implicating these defendants. And even in his last moments, he did not authorise nor would he tolerate his name to be used against these defendants. They are the real sufferers by his death.

There is another operation of his death which is unfortunate to my clients. Death gives a retroactive effect to the memory and the imagination. How differently do we judge

of the acts of a man who is deceased from what we did in his life.

So true is it that epitaphs are proverbially false. How natural it is that the father and the mother and the neighbors of this young man should have their memories and their imaginations affected by the sepulchral light which death has cast over the acts of Wm. Sumner. They heard nothing from his lips to condemn my clients, but from the newspapers, some of which were taken possession of by the enemies of my clients. How unreliable then is the memory of persons in such a situation. But we have shown that the government produces those persons who are affected the most and who know the least, as witnesses in the case.

William Sumner died. We are charged with having killed him. The government says he died "of a mortal wound," inflicted by us. Not instantly. The language is—"And gradually languishing from day to day, he of that expired." How is the fact? Let me ask attention to the medical testimony in the case. We have the testimony of Drs. Jackson, Clarke, Ainsworth, Stedman, and Holmes. What do they all say of the cause of the death?

In the first place, Dr. Holmes, the family physician of Wm. Sumner, and an unusually successful practitioner in Milton, says, "In my judgment the cause of death was inflammation of the throat and air passages." He says if he had not known of external violence he would not have looked beyond the sore throat and exposure for causes of death. These were adequate and sufficient.

Then Dr. Jackson says, "In my opinion the cause of death was inflammation of the throat and of the air passages." He also says that in ordinary cases he would not have thought of looking beyond the inflammation and ulceration for causes of the death. His death might be fairly and reasonably accounted for on other hypotheses than that of violence.

Dr. Ainsworth says, "He died from inflammation of the throat and air passages leading from the lungs." This, he says, did furnish a sufficient and adequate cause of death.

Dr. Clark says, "I should call that state of things described in the throat an adequate mode of accounting for his death. It is very often fatal. I should not have had my attention called to the subject of any external injuries. I should never think of external injuries as the cause of such a state of things. I never heard of external injuries as the cause of such a state of things."

Then we produce Dr. Stedman, a very skilful physician, having had charge of some of the Institutions of Boston in a medical capacity for many years, and being a man in active professional practice at the present time. He says that the inflammation of the throat and the air passages was an adequate cause of death. Delirium is not unusual in those cases. He would not have had his attention called to any other cause.

Well, then, gentlemen, we have the medical opinion as to that state of facts; we have the concurrent opinion of all the physicians that there was an adequate cause of death in the inflammation of the throat and air passages, and it was the immediate, operating cause.

They all say that the external injuries were not a natural, adequate or probable cause of death. This they say distinctly, every one of them. Dr. Jackson answers this most satisfactorily; and he says, "From such injuries as have been detailed by the government, one would have expected him to recover; I should not have expected any bad consequences from the external injuries which were indicated, neither that to the neck, nor to the ear, nor to the eye. From all that the *post-mortem* examination showed, I should not have expected any serious consequences."

Nothing can be more satisfactory than that. The same question was put to Dr. Ainsworth. He says external injuries were not the usual, natural probable causes of the death. There were no indications that any vital parts were affected. All the physicians testify that none of the vital organs were affected.

Again, Dr. Ainsworth says, the injuries were not the

foundation of the causes of death. Dr. Clark says, "By no means would I consider the beating as an operative cause of the inflammation of the throat. The ordinary and usual result of such injuries would be that he would recover."

Dr. Holmes says, "I mean that I should have expected him to recover from any injuries he had received if no other cause had intervened." This is stated in answer to a question on the part of the government. Dr. Holmes would not say that the beating was the original cause of the death, for that would be to say it was a sufficient cause. He says it was not a natural and probable cause of the inflammation of which he died.

Further testimony to the same effect was cited from Dr. Stedman, who said in answer to a question on the part of the government, "My opinion is confirmed that external injuries were not a cause of the death."

Then we have the actual *post-mortem* examination. Then for the first time science came to our aid. When the excited passions and the inflamed imaginations and memories of parents and neighbors were operating against us, then science came to show that the death was the result of natural causes. The report of Dr. Jackson was the first stay to the sea of public opinion which was bearing down my clients and overwhelming, in its course, not only the peace, the happiness, but the reputation, and perhaps the reason, of at least one of my clients.

The testimony of Dr. Jackson was again referred to, and also that of Dr. Stedman, who said, "I cannot by any conceivable mode trace the passage of inflammation from the parts injured to those parts from the inflammation of which he died." So all the physicians say they could not trace any inflammation transmitted from the external injuries to the sore throat from which he died. They not only say this, but they say they never heard of such a case.

The inflammation could not cross from the injured parts inflamed. A law which the maker of our frames put upon our members for wise purposes is an absolute protection.

Again, all the medical testimony goes to show that up to the time of the prevailing miasma in Milton, William Sumner was recovering. Dr. Holmes says there was a fresh attack of inflammation. He says the inflammation was violent and acute.

One fact important to be noticed is the manner in which the evidence has been brought forward in the case. Those who knew the most about the conduct of William Sumner were not called to testify, but those who were called are those who knew the least about it. Rufus Willard Sumner, the brother who was with William a short time when they were playing ball, is called; and James, George, and Edward, who were in the field a long time, were not called. Gilbert Sumner was sitting in Court, and he knew that the testimony on the part of government would be likely to show that William was scarcely ever out of the house. He knew that this was not so, that William was with him and assisted in cutting up a pig on Thanksgiving evening, that he sat up till after midnight with him. He knew that he was up early next morning, that he was out gunning that forenoon. Was he called? No. He sat here in silence, permitting the case to go to the jury with the knowledge on his conscience that they did not know half the truth.

Thus we see that persons who were least with the deceased were called, while those that knew the most were not called. When the jury see that there is something to be conceded, and that those who are struggling for truth have to go to rather hostile sources to procure it, they are always ready to believe that there is even more behind.

The testimony of Rufus P. Sumer was then recited: that William had no bandage on his eye for the first week; that he had not on Thanksgiving day; that he was taken sick on Tuesday after the first of December.

But according to the indictment, we had inflicted a mortal wound 22 days before he died and he was all the time "languishing" and "expressing" of a "mortal wound." How absurd to attribute his death to such a source. The

exposures account for the sore throat of which he died. Wilder Broad says, that William came to his house after 8 o'clock on the evening before Thanksgiving; that he walked from there to his father's; that in the evening he assisted to cut up a pig. William did not do the easy work of holding the light, but took hold and helped to cut the pig. They stayed there an hour, and then went to the house and stayed till midnight.

Was he then an invalid? Was he sick? Was he conscious of any sickness? Was he languishing of a mortal wound? This was twelve days after the affair in Shawmut avenue. Why did not Gilbert Sumner say to him, "You are not fit to be here: you are languishing of a mortal wound: go into the house." None of them saw the slightest reason why he should not cut up as many pigs as he pleased, nor why he should not sit up as late as he pleased.

The testimony of Mr. Broad and of Mr. Hart was then commented upon, to show that the reason why William did not sing a song that he commenced was because of his sore throat, and to show that he was out gunning on Thanksgiving day, from eleven o'clock in the forenoon till two in the afternoon.

Horace Broad says that he was out kicking football, and Mr. Sumner was out there, and when the ball came towards him he kicked it in a most natural manner, the same as anybody would. In this connection, it should be remembered that the football game was after dinner, and as it is most probable that Mr. Sumner had eaten rather hearty, it is not improbable that his overeating caused his sickness when he ran after the ball. He ran five rods down hill and struggled for the ball, but Horace Broad says nothing about the gagging. Only one member of the family testifies to the gagging, while another brother says that he only saw him put his hand to his side and turn red in the face. Now, after the football game, he ate a hearty supper, and after that he walked to his aunt's, half a mile distant, in the evening. This shows a good day's work, even for a well man, and

does not look like the labor of a person who is languishing of a mortal wound. Before Thanksgiving, his actions do not resemble those of a person who is languishing and expiring from the effects of a mortal wound. Even the whole amount of his exposure is not shown, as it cannot be supposed that, if he was able to do all that I have mentioned as facts in the case, he did not do more. It is also shown by witnesses that on the Thursday after the assault, Sumner did not complain of his injuries, but said he felt pretty well, and showed no marks upon his person except under his eye, and this was covered by a piece of court plaster. His exposure in the hall on this occasion may not have been material, if he was in a condition to walk and talk with his friends all the afternoon in Mr. Porter's office. It is evident that Sumner himself felt well and did not apprehend any dangerous results from it.

In regard to the public reports that Sumner was taken into a coal hole and brutally whipped, these have been disproved by this examination, and so have the reports that he died of his physical injuries. Every physician has testified that he was recovering from his physical injuries when he was attacked with the inflammation in the throat. He would not have died of the external injuries, and science proves it. But it is needless to pursue this point. Whatever may be the result of the case, the public will review the conduct of the two young men who were punished by those who were the most natural persons to inflict the chastisement, and then consider whether the punishment was justifiable or not. The law must decide whether it is a case of manslaughter or not. Here we can see that the young were misleading the young, by the confession of the deceased; but this was not wholly known by those who chastised him. They knew and said that they did not consider him the most culpable, and it is therefore supposable that they did not inflict a chastisement of equal severity upon him.

It is highly proper that everything should be investigated to show whether the defendants did or did not kill Sumner.

The examination of the body shows that the inflammation arising from the physical injuries was not communicated to the sore throat, and it has been fully and conclusively proved that Sumner died of an inflamed sore throat. Homicide is the killing of a man, and it may be criminal or not, according to circumstances, and the law only takes cognizance of it when it is criminal. If a man kills another criminally, the law divides the criminality into several degrees. If the killing is done without premeditation, it is called manslaughter; if with malice aforethought, it is called murder. If a man finds another man with his wife, in the act of committing adultery, and kills him instantly, it is called manslaughter, because the killing was done without any preconceived intent. Involuntary manslaughter is a case where a person dies from the effect of wounds which were not given with any intent to kill. The government have called this a case of involuntary manslaughter, which is a great remove from the original charge of murder. We say that it is still further removed from murder, and is only a case of assault and battery. Even the government has been disappointed in the testimony brought forward to sustain the charge of involuntary manslaughter. It may be called so if, because a man who has his hat knocked off, and takes cold, then has the smallpox, and subsequently dies, the person who knocked the hat off and exposed the man to the cold which invited the disease of which he died, is guilty of an involuntary manslaughter.

Dr. Jackson was asked if he did not think that Sumner would now be alive if he had not received the injuries, and he replied that he did, but he did not say that he believed so without any reasonable doubt. Dr. Jackson testified that physical and mental causes co-operated in producing the weakened system. We are not responsible for the effects of mental depression, and the law in cases of homicide obliges the testimony to prove the cause and its direct effects, and none other. There must not be any doubt that there is any other cause of death except the one alleged and upon which

the indictment is founded. In this view, the testimony that Sumner died of an inflamed sore throat must be thrown out, and you must be satisfied beyond a reasonable doubt that the physical injuries alone caused his death. If a person receives a wound, and in consequence of its unskilful treatment the person dies, then the law does not hold the party who gave the wound guilty of manslaughter. If death is not traced to a wound, but to a supervening accident which operated upon the original wound, then the law cannot hold the party who gave the original wound as guilty of manslaughter. If you strike a man and it causes congestion, then you cannot escape by saying the man died of congestion and not of the blow. When the wound given is not mortal, but subsequent actions make it so, then the party who gave the wound is not guilty of manslaughter. To make a case of manslaughter it is necessary to prove that the blow given was the natural, probable and adequate cause of death.

If you inflict a wound upon a man and it kills him, it makes no difference in what condition of health the person was at the time he was struck. If a man is injured, and while in process of recovery he is injured again, and while recovering from the two injuries he is again injured, and dies, the only party guilty of manslaughter is the one who inflicted the last injury. In this case it is proved that Sumner was recovering from his injuries until a second and a third cause intervened, and he died. The second and third injuries were the exposure and the sore throat, and these were not caused by the defendants. Is it shown that Sumner or his parents or friends, ever thought of calling a physician until the 4th December, seventeen days after the assault? There is no evidence that even Dr. Hill was asked for advice, and Mr. Sumner's own mother did not have her attention called to the marks on the neck and behind the ear. Sumner did not complain to her of injuries on the neck. Porter, who was his confidential friend, did not notice any discoloration over the eye or marks upon the neck. From the report of Mr. Andrews, who went to see Mr. Sumner in his capacity

as reporter, and would have been likely to exaggerate a little, says that Sumner looked very well while he was in Porter's office. I mean that if Porter's influence could have had any effect upon the mind of Mr. Andrews he would have exaggerated a little; but I am happy to say that the reporter of the *Times* has been the most correct and accurate of any. I shall not allude to the testimony of Dr. Hill, the "no cure, no pay" practitioner, who has left general practice, or, more likely, general practice has left him, and now confines himself to diseases of the genital organs. I do not believe him capable of giving a correct statement of Sumner's state of health and physical injuries, when he saw him. Some testimony is introduced to show that Sumner's stomach was injured, and one or two witnesses say that he vomited. His father and brother who slept with him did not know anything about his vomiting. His mother saw him vomit blood once, and in this connection the physicians say that in ordinary cases of sore throat expectoration of blood is very frequent. None of them connect the vomiting of blood with the external injuries, but all concur in one opinion, that the blood most probably came from the sore throat, and that vomiting was caused by the suffocating effects of the ulceration.

Dr. Jackson says that in his *post-mortem* examination of the stomach he could not see that the ecchymose state was caused by external violence. The defendants have instructed me that they did not touch Sumner except with their hands, and that they did not strike him on any part of his stomach. I have no doubt of this, but you can only say whether it has been proved by the evidence.

Dr. Stedman describes the effect of the mind upon its slave and servant, the body. It is absurd to suppose that the mind does not affect the body, and we could show, if allowed, that Sumner was, as he should have been, greatly depressed in mind. Cheerful men are healthy; and, on the contrary, grief, care, anguish, sorrow and shame, destroy life. I take a pride in feeling that the mind controls the body. A man of noble spirit may contend against the effects of an honor-

able wound, and recover. The spirit of a man sustains him, but a wounded spirit makes the body receptive of disease. Do you suppose that this young man Sumner, who did not consider his injuries severe enough to call a physician, was reduced to a morbid condition by his injuries which were recovering? There was a disease that the physicians could not find on examining the body. There was a mind diseased. Take the case of a young man in the prime of health, who makes an unfortunate step in life, and he is arrested in his career and has time to reflect upon his conduct, is there not enough in this to produce a morbid condition? The chain of moral causes in this case goes to prove that the mental condition did co-operate in reducing Sumner to a morbid state, but to what extent we cannot tell,—it may have been the greater or the lesser cause.

We justify no assault and battery, the law does not allow it; nor can public opinion come here and make the parties guilty of a manslaughter which has not been committed. Mr. Dalton has done wrong, but he is more sinned against than sinned. The manner of getting Sumner to the house is shown to have been a quiet and natural one. There was no force used. Sumner knew Mr. Coburn when he saw him in the saloon, and he knew that the carriage was to be driven to No. 84 Shawmut Avenue, where he had been before. He did not hesitate in going, there was no decoying and no force used. When he arrived at the house, he was not decoyed up stairs, but entered the chamber in which Mrs. Dalton was, and addressed her with the familiar title of "Nelly," in presence of the injured husband. After questions had been asked, which we have not been allowed to put in, he was ordered to leave the house. What did he do? He got behind the bed, when Mrs. Dalton shielded him, and protested her love for him in presence of her husband. Was not this enough to make the husband indignant, and take some method to prevent another meeting between the infatuated woman and her lover? They took him down stairs, and there they inflicted such punishment as was deemed

sufficient to show their contempt, and then ejected him from the house, and did not intend to inflict this chastisement upon a stripling, but upon a man larger than themselves, for Porter testified that Sumner weighed 150 pounds, and was round and robust in his person.

Mr. Dana referred to the prejudice which has been produced against *Mr. Flanders* and *Dr. Blake*, from the impression that they were at the house of Coburn by agreement, to assist in chastising Porter and Sumner. The testimony in the case, which would go to prove that this was not so, was recited. *Dr. Blake* was at the Medical College attending a lecture when he was sent for to attend *Mrs. Coburn*, who had fainted in consequence of the affair with Porter, previous. He was their family physician.

He further recited the testimony of the persons who were present at the time of the affair, to show that there was no plan on the part of Coburn and Dalton, further than to confront the defendants with their wives. There was no cry of anyone but of women. The door at the front of the house was not fastened. Nothing but the common latch closed it. On this subject there has been great misapprehension. It has been said that they were decoyed into a secret place out of the sight and sound of anyone.

The jury were entitled to return a verdict of guilty of assault and battery. They were not required to do it; but if the government ask it you are entitled to give it.

Mr. Dana closed by stating that he had treated the case from the beginning as he would a civil case, as though it depended upon the preponderance of testimony; and upon that he claimed they had shown that no homicide had been committed, within the meaning of the law. The question for the jury was whether it had been established beyond the possibility of a doubt that a homicide had been committed. By acquitting of homicide, no stain would be put upon the character of the defendants, and no imputation would rest upon any living person. They would simply say that what

was done then did not kill Sumner, that other causes intervened.

The defendants may have done wrong in attacking him—they did. But under what provocation the jury do not know; the defendants know. There is a little danger from the sympathy of the jury here. But they should regard the character and the future of the living, whose character and efforts have been clouded and broken.

He could not ask the jury to consider any of these things. They had only to pronounce their verdict upon the facts, and if they found the defendants guilty of assault, say so. From blood guiltiness he hoped they would deliver them.

CLOSING ARGUMENT FOR COMMONWEALTH.

Mr. Cooley. Gentlemen of the Jury: When you were called upon in this case, you were also called upon to make your solemn attestations before Heaven that your minds were not, and would not be, prejudiced by a public feeling, in judging of the case. I should not have required this of you, for I have seen you during the whole term, and know that you were men of sterling principles, and would not sit upon the jury had you felt any bias. I came here, at the commencement of this trial, with no prejudices against the defendants, so help me high Heaven. If I had seen any admission of an influence formed by public opinion to operate against the defendants, I would have pushed it back, though I stood alone in doing so. I have no prejudices in the case, and many eminent legal gentlemen have expressed the opinion that the indictment against the defendants is not sufficiently commensurate with the offense. Whatever the claim of public opinion may be, whether for or against the defendants, it should not enter the Court House, if I could prevent it. If it was my last public act, I would not do the defendants an injury—not if public opinion surged against the foundations of the Court House. Trusting the character of the jury, I would not have required an oath of you that you were free from prejudice in this case. I have the utmost

confidence in you as gentlemen of honor and principle. Many persons look upon the prosecuting officer as hard and inflexible in his efforts to convict all who are brought before him. As a prosecuting officer, I have only a desire to see that the law is administered justly in all cases. In this case I only desire to have the law faithfully and impartially applied, and I fully believe that you do so, even if you have read the newspapers. I do not believe that you will form your verdict upon public opinion, but upon the conscientious conviction of your own minds.

With these preliminary remarks, let me pass to another point, that in this case is presented by the defense. Mr. Dalton alone was singled out as the greatest sufferer. I will not allude to the reason why this is done, and I hope it will not affect your minds. It has been said that the defendants had hopes in life which have been blasted by the acts of their wives and the young men who were chastised. Does the conduct of Dalton, after the assault, show this? It has been proved that on the same night, after the assault upon the young man who now lies in his grave, Mr. Dalton slept by the side of his wife; and would he have done so if she had been very guilty, or if Sumner had committed any criminal offense with her. And the same may be said of Mr. Coburn.

If I have any professional discernment, I say that this charge against the defendants carries with it no imputation that they designed to kill Sumner; but, looking at the injuries, I can see no cause for any apology in bringing the indictment of manslaughter against them, and if you think that there is not evidence enough to support the indictment, I hope you will acquit them. If the verdict should be one of assault and battery, and the counsel for the defendants wish to show the amount of justification in mitigation of the crime, I will myself ask the Court to be influenced by it. I do not ask for a verdict of assault and battery. I believe that if you look at the case as I do you will find the defendants guilty of manslaughter. Under our law, manslaughter is a felony and punishable in the State prison. The indictment contains four

counts, and we are to find if the defendants are guilty of one or all of them. We know that William Sumner was a healthy person up to the 17th November; that he then received violent external injuries, and that he died on the 11th December. He received no other injuries except those of the 17th November; he had no chronic diseases, to shorten life; and yet, I have heard something about a spontaneous cause of death. It seems to me that the medical men have run this "spontaneous cause" a little hard. I refer more particularly to the testimony of Dr. Ainsworth, who has stood by the defendants, and assisted them to the extent of his ability. Dr. Ainsworth commands my respect, and I do not believe that he would try to sustain a theory upon false reasoning; but I think that he did run the "spontaneous cause" rather hard.

It is also intended by the defense to give you the impression that Sumner visited Fera's saloon on the 17th November, to meet Mrs. Dalton by appointment, but they have not offered any evidence to prove it. It may have been so, but it has not been proved; perhaps it will be. We see that Porter was flogged that morning by the defendants, and subsequently we see them leaving the house in company with Flanders and Dr. Blake. In this connection I would say that we went into a reluctant camp to obtain testimony. I do not believe that we have got too much of our evidence from this reluctant camp. I am inclined to think that we have not got half of the story of what transpired in the house in Shawmut Avenue. I am inclined to believe, and I do think, that Dr. Blake and Mr. Flanders were in no manner connected with the flogging. I believe what they say was their object in going to the house. If the argument is true that Porter and Sumner were sent for at the same time, and that a joint meeting at the house was intended for the purpose of talking over matters with them in a friendly way, it is a little unfortunate that the cow-hide was so near at hand when Porter arrived. It is also a little unfortunate that they expressed their determination, after they had whipped Porter, to flog Sumner wherever

they should meet him. These facts, admitted by the defendants themselves, do not show a very friendly intention, and negative the idea of an intended joint and friendly meeting. Even if this had been shown, it would not have had any legal or justifiable significance. It might go to prove the amount of ferocity used.

If it be true that the letters were sent to Porter and Sumner at the same time, I do not see that there was any friendly intent. I remember that Dalton said to Margaret Wier that he should not flog Sumner, and when he left the house a few minutes afterwards he said that he should flog Sumner wherever he found him. These circumstances remove the supposition that the intentions of the defendants were friendly towards Sumner and Porter. But even if they did intend to get them to the house to admonish them, and thereafter finding affairs were much worse than was expected, they ordered Sumner from the house, and because he did not go, it was not necessary to drag him down stairs and violently assault him in the basement. It is therefore immaterial whether the purposes of the defendants were friendly or not. It is also something new in my experience to hear that a woman can leave her dressmaker and go down stairs and remain an hour with a gentleman. A woman will not leave her furbelows for the contents of an East India vessel. And yet the nurse says that Sumner did call at the house before the 17th November, and this is about the first we hear of the intimacy between him and Mrs. Dalton—and Mrs. D. left her furbelows and spent an hour with Sumner. She was marvelously willing to accommodate him, if she did so.

I have heard nobody raise a voice for these women, but who was it that suggested the statement that one of them had parted with her wedding ring, and afterwards retracted it, and the counsel was obliged to raise and correct his statement to you? The defendants, it is shown, did not believe them to be false to their marriage vows, for they lived with them in the marriage relation, after they had flogged their alleged lovers. May it not then be possible

that the women have been unjustly accused? It is a marvelous fact that the defendants did live with their wives and slept with them up to the time of their arrest; but after their arrest it is shown that they did not live with them. Was not this latter act done to create an impression against the women and in favor of the defendants? But was it not done too late? The testimony in regard to the introduction of Sumner to Mrs. Dalton in the chamber, and his familiar remark, "How do you do, Nelly?" was most ingeniously offered to prove the identity of some letters, which were sought to be put in as evidence, and which were probably addressed to Nelly and not to Mr. Dalton. The amorous poetry of Moore's was addressed to "Nelly."

The whole conduct of the defendants leads to but one supposition, that they had a suspicion that there was an improper flirtation between their wives and Porter and Sumner, but not that the latter had taken improper liberties. Accepting the supposition that there was only a flirtation, it would have been more proper for the defendants to have reasoned with their wives and admonished them that it was wrong. They should not have flogged the young men and then have gone to the newspapers and had the affair published as something to boast of, and spoke of it to others as a brave and manly act. They took Sumner to the house on a declared purpose to flog him for having taken improper liberties, which I think means simply a flirtation. They took him to the chamber and after he had been ordered out, it is pretended that he lingered about the bed of Fanny or Nelly, allured by the charms of the females. This is quite poetical, but what a different aspect do the facts present to the judgment. Were not the defendants standing at the door with their purpose gleaming in their eyes, the women screaming and fainting, and was not Sumner prevented from going out through fear of a chastisement? Were their purposes friendly in dragging him down stairs, and when he attempted to go out of the front door, in pulling him down into the basement, where, as they stated, they gave

him "a d——d thrashing." What is the meaning of "a d——d thrashing?" Does it mean a tap on the hat, or a scratch on the finger from which lockjaw ensues? The people on the outside of the house heard cries and scuffling in the entry, which some testify receded to the back part of the house, and others say they seemed to go upstairs. It is said that the cry of "Oh don't, you'll kill *him*, or *me*," was in a female voice, but might it not have been the voice of such a young man as Sumner, in the position he was in at the time. Whether he made the cry or not, it goes to show that the assault was severe, and alarmed those who were in the house. Flanders says that while he was standing at the head of the basement stairs he heard blows struck. The cook says that she heard scuffling down stairs about five minutes. Two men can give one man "a d——d thrashing" in five minutes. It is said that the doors and windows down stairs were usually locked.

This of course was known to the defendants. But why did not the cook, who told them not to beat Sumner, open the front door when the people outside rung the bell? Was she forbidden to do it? That Sumner was beaten while getting over the fence is proved by the confession of the defendants to Flanders. Now take the autopsy, and does it not show that Sumner was violently beaten, and that his injuries predisposed him to take the disease of which he died?

I have not thought it necessary to go over all the details in regard to the particular bruises and the number of them on the person of Sumner. The aggregate result is the question which the jury will determine upon. The character of the bruises is well shown by the marks which Sumner bore upon his body when he died. Dr. Hill's testimony is important and the defense have tried to dispose of it by stigmatizing his reputation as a physician. There was no effort made to impeach his testimony, but he must be got rid of by an attack upon his medical practice. I think he has done no more in this case than some of our most eminent surgeons. He may be of humbler character and his practice less honor-

able, but his testimony appears as honest and fair as any given during the trial. It was not necessary that he should be a physician to enable him to testify to the appearance of the wounds on Sumner. A person who never saw a medical work might have given the same testimony.

It is said that the government did not call upon Gilbert Sumner, who knew that his brother had exposed himself to cold by assisting in cutting up a pig. Gilbert's testimony was of no consequence if his brother died of disease which had a spontaneous cause. It is said that the family did not think of prosecuting the defendants for their assault upon William Sumner. That family had something else to think of besides rushing into litigation. One of their most cherished members, whose cheerful music and happy flow of spirit made the family circle pleasant, had suddenly become almost dumb, and they looked to his injuries and their treatment, rather than to litigation.

In regard to the sensitiveness of Sumner after the 17th November, which produced, it is said, mortification and grief, how is it that he had nerve enough to plan the seduction of another man's wife. It is not the person of a sensitive mind who plans the seduction of a woman. And yet Sumner is represented to have been extremely sensitive, after the 17th November, and his spirits were depressed by mortification and shame. Is it not more likely that his depression of spirits was caused by the injuries which he received?

Great stress is laid upon his exposure; but if Sumner was a healthy man before the 17th November, and the injuries which he received on that day were but slight, as it has been attempted to prove, then is the amount of exposure testified to a sufficient cause for his weakened state of system. Sumner was fortified against cold by his habit of bathing in cold water. On every occasion when Sumner exposed himself to the weather, none of his companions contracted a cold. The effect of the argument in regard to his exposure goes

to show that he must have been in a very weak state, and what caused this but the injuries which he received.

It is stated that scarlet fever prevailed in the neighborhood; but Sumner had the scarlatina fourteen years previous, and was not likely to be affected by the same disease again. If there was a malaria in the air, why did not some other member of the family become affected by it? They were not in a weakened state; they had not received any severe external injuries. A spontaneous cause for death must be looked for, if the malaria fails to produce the inflamed sore throat. This, the physicians tell us. With all due respect for medical gentlemen, I think the physicians are mistaken in their opinion in regard to the cause of the inflamed sore throat, and I am glad that the rights of the government and the defendants are to be determined by men of common sense, and I think the jury and myself are as competent as anybody to pass upon the question of the cause of Sumner's death. I do not mean to say that the medical gentlemen who have testified to spontaneous causes, are not men of common sense, but I think that plain matter-of-fact men who have the evidence in this case presented to them can find some other than a spontaneous cause for death. The great error of the defense, if I may speak of it as an error, is the argument that the injuries were not the immediate cause of death, and if a cause at all, a remote one. In law, the cause, however remote, of the proximate cause, is the immediate cause.

MR. COOLEY'S CLOSING ARGUMENT—(Continued).

February 2.

In the position which the counsel for the defense have taken, they place great stress upon the spontaneous cause of death. They go behind the *post-mortem* examination, which revealed a proximate cause and an immediate cause of death, and they take up the spontaneous cause. The physicians all say that although the external violence was not sufficient to produce death, in their opinions the death

would not have occurred except for the external violence. The supervening causes, exposure and mental depression, would have had no effect unless the external violence had been administered. The tendency of the injuries was to weaken the system, and if this weakened system created a spontaneous cause for death, then the injuries were a proximate cause. Take the case of Daniel Webster, who was thrown from his carriage, and some weeks after he was attacked by a disease which science traced directly to the injuries, although the injuries were not to be seen externally. The medical men did not look for a spontaneous cause; they saw in the injuries an adequate cause for the weakened state of the system. In this case, the calm and tranquil mind of Dr. Jackson has seen that the injuries were the predisposing cause of death. And yet, on his *post-mortem* examination he did not see any connection of the external violence with the disease of which he died. But he and every one of the medical men, say if it had not been for the injuries of the 17th November, Sumner might have been alive and well. They also say that a well man might have been attacked by the disease of which Sumner died. This might have happened, I grant, and so might Sumner have been killed on a railroad, or be stabbed to the heart. But because he did not receive any other injuries after the 17th November, and these were not sufficient to kill him outright, are we to look for a spontaneous cause? If science could not find any other cause for the inflamed sore throat, it did not throw much light or radiance in favor of the defendants. The same science which finds an assignable cause in the injuries and mental depression, merely says that the inflammation might have had a spontaneous cause. I therefore will dismiss the spontaneous cause as worth nothing. Let us take the injuries, the exposure and slight mental cause, and the bridge is made upon which we can safely walk from the external violence to the inflammation and death. Assuming the theory to be true that inflammation cannot be transferred from one tissue to another, I would ask the light of medical science how inflam-

mation can be transferred from the interior of the neck to the exterior, if it cannot be transferred from the exterior to the interior of the neck. Dr. Jackson says that the exterior inflammation on the neck was caused partly by the external violence and partly by the interior inflammation of the throat of which he died. This opinion sets the matter at rest, that the external injuries were the predisposing cause of the inflammation of which he died.

In regard to the effects of exposure in producing the inflammation, what is its relative influence? To ride into Boston, to walk about the farm, to kick a football, to cut up a pig, to ride five miles in half an hour, to stand in a hall fifteen minutes, to ride to his aunt's, these are all dangerous to a system fortified by good health. And it is even said that it was hazardous for Sumner to lie down in the house, lest some spontaneous cause should play the "old Harry" with him. This is absurd. All the physicians have testified that the system was in a morbid condition, or rather they said that the system was prostrated by the influences of external violence, exposure and mental causes. What are the influences of the assigned, compared with the original cause, the external violence? There was no mental anxiety on the 17th November, but we are told that it commenced immediately after. Have we seen any physical changes in the defendants, who have been arrested for a crime, and who believe their wives to have been false, a thing which is tended to wrench a man's mind most terribly?

The effects of mental depression, under various circumstances, were reviewed by the District Attorney, and by his reasoning he said it appeared that not more than one man in a hundred sink under the effect of moral causes. Depressing emotions may produce most disastrous effects, according to the testimony of Dr. Clark, but he also says that upon the evidence in this case he cannot think that moral causes operated very strongly in producing the weakened state of the system. And if he was depressed mentally, was not the

cause of it the external influence? There is no proof that he had any great and heavy sorrow on his heart.

We may dispose of the spontaneous cause, the influences of the exposure and several causes operating upon the system, and see that the great primary and appreciable cause of death was the external violence. If he had not been beaten he would now be living. The defense contend that it is necessary to prove that the probable, reasonable and original cause of death was the external violence. They contend that the consequences supervening have no connection with their responsibility. They say that they are only accountable for the natural result of the violence used. If this is so, there is no distinction between manslaughter and murder. Murder is when death is directly traced to a blow given. If there cannot be an involuntary homicide there is no such thing as manslaughter. If we are to trace death to the direct blow, and not to its natural, probable and reasonable result, then we cannot make a case of manslaughter. You are to judge of the natural consequences which followed the injuries, and if they placed Sumner in a condition to contract a fatal disease, then the defendants are guilty of an involuntary homicide.

I have stated that whatever your verdict is, I will, if requested, ask for a mitigation of sentence from the Court. If you wish, you can bring in a verdict with a recommendation to mercy, and I am contented. But I do not wish to see a repetition of somnambulism in this Commonwealth. Let it rest as the intellectual idiosyncrasy of that great man whom we all like to honor. I ask to have your opinions founded upon your own judgments, without being swayed by prejudices from any source. I have discharged my duty. If you think that you ought not to go higher than a verdict of assault and battery, then you should return such a verdict, and no other. But remember your responsibility to society, and think whether your verdict will be one that will not take a single security from the guards around society. I fully rely upon your judgments; and now, thanking you most cordially for

your kind attention in listening to me through this trying and difficult case, I commit the case to your hands under the instruction of the Court.

THE CHARGE.

JUDGE NASH: Gentlemen of the Jury: The defendants stand arraigned before this tribunal, charged with the manslaughter of William Sumner, by inflicting mortal injuries upon his person on the 17th day of November last, of which injuries he died on the 11th day of December. Under this indictment, if you do not find the main charge sustained, it is competent for you to render a verdict for assault and battery.

During this long and laborious trial a Mississippi of inadmissible testimony has been flowing close by the side of the legitimate current of investigation, and the Court has strenuously endeavored to preserve the dividing embankment and keep pure the fountains and channels of the administration of criminal justice. Nothing can be more foreign to the true procedure in this case than to go aside from the main issue into extraneous investigation. Whether the deceased has been a party to a foolish flirtation between a thoughtless woman and a thoughtless boy, or stood amenable to a charge of a graver character, is beyond the province of your present inquiry. Another tribunal, another occasion, would have been the proper place for its consideration.

Carefully banish and eliminate from your minds all disturbing biases and discoloring impressions, whether existing before this trial, or caught up in the shifting phases and side insinuations of this hearing. Let the "dry light" of abstract intellect and passionless intelligence be brought to the determination of their issue, with the calm and equable thought that works out a mathematical problem.

The consideration that the defendants are liable to be sentenced to an imprisonment of twenty years in the State Prison—let it not operate in their favor, to induce a verdict of acquittal. And do not render a verdict against them any

readier because they may be only punished by a fine of one dollar or confinement in jail for one day; such being the extremes of the statutory penalty for manslaughter.

Let not any alleged provocation operate in their favor. In law it is no justification. Society is undermined, law and justice a delusion, and the great work of human government, with its array of legislation, tribunals, armies and municipal law, a failure, if a person deeming himself wronged is permitted to "take the law into his own hands," instead of resorting to the regular tribunals of the land. The popular sympathy with the "wild justice" sometimes executed by private vengeance, is not sanctioned by the sober reason of a civilized society, and has its foundation in barbarous instincts, not fully tamed out of the human heart. Lynch law justice is the justice of savage life. The grandeur of human government culminates when pure law, purely administered, pervades and controls a community more by its inherent reason than its penalties, and human institutions then approximate the repose and equity of secular Christianity, that perfect type of a perfect civilized society.

Neither let the manner of the assault operate against these defendants. Whatever revolt of human feelings may follow a dastardly deed; however human nature may cry for fair play, and against unequal odds, so that statesmen sometimes boast of it as characteristic of a people to be proud of; however cogent the maxim, never to strike a man that is down, which constitutes the chivalry of mobs, and redeems the brutalities of the ring; all this is foreign to the matter before you. Banish it from your minds; it is a discoloring ray in the white light of a fair judicial investigation.

Nor does the popular opinion enter within these walls. Listening, as you do, under the sanctions of your oaths, to the testimony, face to face with the witnesses; judging, from their appearance, of the credibility due to each; watching the shifting aspects of the case, and the ebb and flow of testimony upon points as they rise and recede; you see much that cannot be reported to the community at large,—and it

is your prerogative to form, not to follow, public opinion—to rectify it, if wrong; to confirm and establish it, if right.

The charge against the defendants is for what the law terms involuntary manslaughter. Involuntary manslaughter is where it appears that death was not intended, but is accidentally caused by some unlawful act, or act not strictly unlawful in itself, but done in an unlawful manner and without due caution. Involuntary manslaughter is where death is accidentally caused by one in doing an unlawful act.

The reason why a person perpetrating one crime, and therein accidentally killing another person, is responsible for the resultant homicide, is, "that a wrong-doer cannot apportion his own wrongs"—can not halve his criminality—cannot be allowed to say "I went somewhat further than I meant to in the perpetration of one crime and committed another;" "I set fire to the house in the night time, but did not propose to burn the inmates"—"I intended to stun with the slung-shot, but not to murder." Were such pleas to be admitted, human life and property would be unprotected and human society disorganized; for the allegations could hardly ever be disproved, and it would be impossible for juries to determine at what point the less criminal intention stopped and the more atrocious begun. The wrong-doer must abide the consequences.

Was there an unjustifiable assault committed by the defendants upon the person of William Sumner? There seems to be no evidence in the case tending to establish a justification—an order to quit the house—a man's castle—only justifying a reasonable and adequate force; a finger's weight beyond it constituting an assault. 1st, Did the defendants inflict on William Sumner great bodily injuries. 2d, Did William Sumner die of those injuries? The mass of the material testimony in this case will gather round these two points, and some subsequent subdivisions under the latter.

Before proceeding to lay down the specific principles of law I conceive applicable to this case, I will refer, by way of illustration, to some general principles and recorded

cases, tending to elucidate the law and medical jurisprudence, which is to govern your investigations:—2d Arch. Crim. Pr. and Pl. 221-6, 221-7, 261-15 to 261-21, 262, 209, 213; 1st Hale, P. C. 428; Commissioners Rep. Cr. Code Mass. "Homicide" pp. 13, 14, 15.

From these citations the following general principles may be collected:—If, in the course of doing an unlawful act, an accidental homicide is committed, or death is accidentally caused by said unlawful act, it is manslaughter.

If a wound, given in the course of doing an unlawful act though not in itself mortal, (for want of proper application or from neglect) turn to a gangrene or fever, and the gangrene or fever is the immediate cause of death, the party so giving said wound is guilty of manslaughter, (1 Hale, 428.) for the wound is the cause of the disease.

If the intervening disease (any inflammation or fever) is traced directly to the injury, and the injury is done in the course of doing an unlawful act, it is manslaughter. The injury must generate the disease in the ordinary course of life and nature.

From the general principles, and from the recorded cases, I deduce the following specific rules to guide you in arranging the facts in this case, and forming thereon your verdict.

The injuries inflicted must necessarily not exceptionally, proximately not merely remotely, be connected with the death; and may be connected either immediately, or mediately by their direct devolvment of results, or progress and stages of resulting diseases;—or if the injuries cause an inflammation, and the inflammation mechanically suffocates, or the inflamed parts suppurate or ulcerate so malignantly as to cause death.

If the death was caused by the gross negligence of the deceased, or of his physician, and you are convinced that the deceased would, in all probability, have recovered from the injury, except for such gross negligence, the defendants are not guilty.

If the injuries caused the death, and were adequate to

such a result, it is no answer or excuse for the defendants, that, under other circumstances, with more care and prudence, or by sooner calling in a physician, or by employing greater medical skill, death might have been averted.

What did Sumner die of?

Dr. Holmes says—"The cause of his death was inflammation of the throat and air passages."

Dr. Jackson says—"The cause of death was inflammation of the throat and air passages."

Dr. Ainsworth says—"My opinion is, that he died of inflammation of the throat and of the air passages leading from the throat into the lungs."

Drs. Clark and Stedman gave substantially the same opinion on a supposed case, not having heard the testimony.

The medical testimony thus agreeing upon the immediate cause, the inquiry follows, as to the cause of this inflammation, *causa causati*. And the general principle running through the whole investigation is that—It is only material that it be shown that the deceased died of the injuries inflicted, as their natural, usual, and probable consequence.

As to mental depression—Was it dependent, i. e., resultant from the bodily injuries and the shock to the system; or independent, i. e., resultant from extraneous and other influences?

So far as mental depression was the direct and natural consequence of the injuries inflicted by the defendants, if it contributed to the death directly, or mediately by rendering the system more morbid and sensitive, and destroying its recuperative power, in necessary connection with physical pain and bodily suffering from the same cause, it may be weighed by the jury in determining upon the cause or connected causes of death; and to these considerations the government are entitled.

But the defendants are entitled to have weighed in their favor any independent mental depression; independent, that is, not resultant from or caused by the battery, but from and by other and extraneous events; and if it was the substantive operating cause of death, or one of two or three substantive

operating causes of death, which cannot be reasonably apportioned, so that the jury cannot say that the alleged cause was the true cause, the defendants are entitled to have this fact weighed and considered in determining the real cause of the death. And before recapitulating the evidence upon this point it is necessary to consider the doctrine as to co-operating causes.

If two causes co-operate to produce death, each independent, one not growing out of the other naturally and by necessary sequence, the one caused by the defendants, the other not, the law does not permit the death to be predicated upon the one alone. Two independent causes of death co-operating, the law attributes death to the latter, whether the latter agency is a person or a disease; as, for example, and speaking somewhat mathematically, if a man one-half dead by previous disease receives what may be termed a semi-mortal blow by a person, and both the half-mortal agencies, co-operating, produce full death, the latter agency is the culpable one, and the person is guilty of the homicide. On the other hand, if a person receive a half-mortal wound, and an independent, half-mortal disease sets in *aliunde*, jointly producing full death, the law predicates the death upon the agency of the disease, and the inflictor of the wound is not amenable.

All severe injuries, such as wounds, bruises, and shocks to the system generally, produce disease, such as inflammation, general debility, and sometimes gradual decline and sinking of the vital powers; and when heterogeneous diseases, diseases of a radically different character supervene, it is comparatively easy to trace up and compare the respective agencies; as when a person has a chronic or acute inflammation in consequence of wounds, a slower or more rapid inflammation, in the course of the treatment or otherwise catches the smallpox, or the yellow fever, or falls from his bed, or happens to take poison, or his physician maltreats the case; here there is no complication or difficulty in severing and distinguishing the respective agencies. The great

difficulty is, where a homogeneous or similar disease supervenes upon another; as where a fever caused by bruises is followed by a fever from independent sources; where an inflammation from wounds is followed by, or complicated with, an inflammation from atmospheric causes; or where injuries causing a general feverish state of the system are found nearly contemporaneous with local fever; or especially, where inflammation caused by injuries to one part of the system, is followed by, or complicated with, an inflammation in closely continuous parts, parts adjacent to the injured parts. When there are such joint and entirely independent causes of death, it is considered beyond the jurisdiction of the law. It is deemed hazardous to allow a too minute balancing of the weight of conjoint agencies. The criminal procedure cannot add or subtract, divide and subdivide, in such cases; its province being to administer law, not arithmetic; jurisprudence, not comparative anatomy.

The test question, in such cases, will be—Was it (1) a new and independent disease setting in, and causing death; or (2) was it the natural and ordinary growth, development, and progress of the disease caused by the original injury and shock to the system? If the former, the defendants are not guilty. If the latter, guilty.

(1). Was it a new and independent disease supervening? In considering this question it is necessary to recapitulate the testimony as to actual exposures as causing or not causing a new and independent disease, and also the medical evidence.

[His Honor fully recapitulated the evidence bearing upon this question.]

Such being the substance of the evidence as to the actual exposure, and of the testimony of the experts, as to its effects, to it is to be applied the test before suggested.

Was William Sumner recovering from the original injuries? The defendants contend that he was, pointing to the positive testimony of the physicians to that effect—and also alleging that it is proved by the facts that if the old in-

flammation had subsided; that if it continued, it must long before have suppurated or ulcerated; that there was a new and acute inflammation, which all medical science pronounces not generated from the previous inflammation or the injured condition of the system, but absolutely demanding a fresh and distinctive cause; that the primary inflammation as well as the secondary, was acute, and no medical theory can connect the two, so far severed were they in point of time;—that the inflammation of the neck from the original injury, though locally near, was anatomically remote from the final and fatal inflammation in the throat; and that all this is demonstrated, on the *post-mortem* examination of the body, physiologically by laws as unerring as those according to which the structure of the earth, geologically, reveals its history and convulsions.

This theory the prosecution controverts, and alleges that there was a continuous sinking and debilitation of the bodily energies from the original injuries, the loss of appetite, and bruises on the stomach. That Sumner's inability to sing showed a permanent lesion of the throat and air-passages, of which the inflammation was only the natural and legitimate development and consequence, and that his corporeal frame—"fearfully and wonderfully made"—was so broken down and disorganized that his food turned to poison, and the atmosphere of heaven was to him malaria.

If, however, you are convinced that Sumner was actually recovering, and a new and independent disease—an inflammation not substantially generated from the original injuries—supervened, which inflammation was the substantive cause of death, the defendants are not guilty.

(2) On the other hand, the government contends, that the severe injuries—the bruises upon the eye, the ear, the skull, the great reservoir of nervous energy,—on the jaw and neck and throat, delicate organs, with important vital functions,—upon the chest, at the pit of the stomach—the unnatural enlargement of the spleen,—the extravasated blood of the lining membrane of the stomach, so important an or-

gan in the digestive and restorative powers of the body—the general shock to the system, the shattering of the harp of a thousand strings, whose daily harmonious action is a daily miracle—the depression of the vital spirits from the injuries and the shock, deadening the recuperative powers of nature, destroying the *vis vivida* of life, poisoning the blood wherein is the life of man,—the slow, morbid, and sullen progress of inflammations, chronic or acute, more rapid or more retarded, in a system of low vital action,—inflammation developing inflammation—one stage of morbid affection gliding into another—the stomach sympathizing with the brain—and each depressing and weakening the vital action of the other—that all these together constitute a cause of death predominant over, and exclusive of, all minor influences, and being directly traceable to the injuries inflicted, sustain the allegation of the indictment, that the defendants gave William Sumner mortal injuries, of which he continuously languished, and languishing did die.

Gentlemen, the cardinal point of the case is here. The testimony is before you. The law has been presented to you as drawn from the best established authorities. The eminent thoroughness and fidelity, as well to the Commonwealth as to these defendants, with which this protracted investigation has been conducted, have left no pertinent evidence unproduced, and no produced evidence unsifted; and the toil has been relieved by the impressive oratory of the Commonwealth's Attorney, and the scholarly eloquence and culture of the counsel for the defendants.

The protecting shield of their presumed innocence, in obedience to the great maxim of the criminal law, the Court has advanced before these defendants, up to the present stage of the trial, and now transfers the same to you to be in like manner upheld to the moment of your last and decisive ballot. Certainty, moreover, beyond a reasonable doubt, must test every link in the chain of criminality to be drawn around the respondents,—not a mathematical certainty, impracticable and impossible in human transactions, but that

abiding conviction upon which you would act in your own grave and important affairs. And this vital and operative maxim of conviction beyond reasonable doubt is not merely of great consequence to the defendants, but of decided importance to the general theory and operation of the administration of criminal justice; for nothing is so fatal to the essential reverence for law and respect for its administration, as that there should be the reality or even the suspicion that the guiltless have been pronounced guilty. But if a great wrong has been done to a former member of society, and through him to the rights and interests of society in general, its vindication is committed to you. Those rights of society, and the fate of these defendants, are in your hands. Consider of your verdict.

The *Jury* retired to their room at the conclusion of the charge, at a quarter after one o'clock.

THE VERDICT.

At eleven-thirty o'clock JUDGE NASH came in with the counsel on both sides and the defendants, Coburn and Dalton. In a few minutes the Jury came in and took their seats.

The Clerk: "What say you, are the prisoners at the bar, Edward O. Coburn and Benjamin F. Dalton, guilty or not guilty, on the charges alleged in the indictment?"

The Foreman: "Not guilty on the charges in the indictment—but guilty of Assault and Battery."^s

March 5.

Today the prisoners were sentenced to be imprisoned in the County Jail for the term of five months.

^s On the first ballots a majority were in favor of a verdict of manslaughter. After they had been out about five hours they were equally divided upon manslaughter and assault and battery. Subsequently a majority were in favor of assault and battery, which finally became unanimous.

THE ACTION OF BENJAMIN F. DALTON
AGAINST HELEN M. DALTON FOR
DIVORCE. BOSTON, MASSA-
CHUSETTS, 1857.

THE NARRATIVE.

After Mr. Dalton, the plaintiff in this action, went to jail for the assault on his wife's lover, Sumner, (see Trial of Coburn and Dalton *ante* p. 520) his wife went to live with her sister, Mrs. Coburn, and later removed to the home of her mother, Mrs. Gove. While he was in jail Dalton still believed his wife innocent of actual criminality with Sumner. Then there came a confession by the wife; whether a confession of her folly or something more, is not exactly clear; but from his conduct the husband, it would seem, did not consider that it embraced his wife's guilt. At any rate on becoming a free man again, he brought this action for divorce on the ground of the wife's adultery. The defense denied the charge and insisted that the husband was forced by his relatives to take this stand. But here a startling thing occurred; Mrs. Dalton became very ill. The plaintiff charged that she attempted to prematurely destroy her offspring to hide the evidence of her guilt. The defense insisted that she had suffered a miscarriage and claimed that the husband had believed his wife innocent, and would have lived with her but that his family and friends, in order to poison his mind against her forever, circulated the story which it was endeavored to establish at the trial. Whether the last grave charge was true or false it is certain that Dalton came to believe his wife guilty. At the trial the evidence of his wife's guilt was very strong, but she had for her counsel the distinguished advocate and orator, Rufus Choate, and his

speech to the jury is one of the greatest efforts which the history of judicial trials records. Notwithstanding the strength of the plaintiff's case, he contended that putting the proof in the strongest possible light, the entire evidence was at least consistent with a theory of defendant's innocence, even if also consistent with a theory of guilt; and he claimed that under the circumstances, as matter of law, the plaintiff was not entitled to a verdict. He made an impression upon a minority of the jury that could not be effaced. The strong parts of the plaintiff's evidence crumbled away beneath his searching investigation. His power to persuade and convince was irresistible. The jury disagreed, two men refusing to find the wife guilty, and Mr. Choate's case was won.

THE TRIAL.¹

*In the Supreme Judicial Court of Massachusetts, Boston,
April, 1857.*

HON. PLINY MERRICK,² Judge.

April 14.

On March 11, 1856 a libel had been filed by B. Frank Dalton alleging that his wife Helen M. Dalton had committed

¹ *Bibliography.* "Shamut Edition. The Dalton Divorce Case. Domestic Dissensions in Fashionable Life, Exposition of Gallantry, Gaiety, Gossip, Guilt and Gutta-Percha. Legal Proceedings with all the Evidence in this Remarkable Case. From the World of Fashion. Published under the Copyright of the Bee."—From the Roger Foster (N. Y. City) Collection of Trials.

* "Boston *Daily Bee* Extra. Opening Address and Closing Address and Closing Argument of Richard H. Dana, Jr, Esq. Counsel for Libellant (Benj. F. Dalton) in the Dalton Divorce Case. The Phonographic Report of the *Daily Bee*. By Messrs. J. M. W. Yerrington and Rufus Leighton of Boston and Messrs. Henry M. Parkhurst and William H. Burr of New York. Office of the Boston *Daily Bee*, May 1857."

* "Boston *Daily Bee* Extra. The Arguments of Counsel for Libellee, Helen Maria Dalton, in the Dalton Divorce Case, consisting of the Opening Address of H. F. Durant, Esq., and the Closing Plea of Hon. Rufus Choate. The phonographic Report of the *Daily Bee*. By Messrs. J. M. W. Yerrington and Rufus Leighton, of Boston; and

adultery with one William Sumner of Milton, deceased, at the lodgings of the libelant, at the house of Edward O. Coburn, at the shop of one Fera at Boston, at a public house in Brighton and at divers other places between September 1 and November 17 in the year 1855.

The libelee's answer admitted the marriage but denied that she ever committed the offense alleged. A supplemental answer averred that the libelant had condoned the offense and that he himself had been guilty of adultery with certain women to her unknown.

*Richard H. Dana, Jr.*³ for the Libelant; *Henry F. Durant*⁴ and *Rufus Choate*⁵ for the Libelee.

A jury having been empaneled and sworn.

Messrs. Henry M. Parkhurst and William H. Burr, of New York. Office of the *Boston Daily Bee*; May, 1857."

* "*Boston Daily Bee* Extra. Judge Merrick's Charge to the Jury, in the Dalton Divorce Case. The Phonographic Report of the *Daily Bee*. By Messrs. J. M. W. Yerrington and Rufus Leighton, of Boston; and Messrs. Henry M. Parkhurst and William H. Burr, of New York." ["Entered according to Act of Congress, in the year one thousand eight hundred and fifty-seven, by Bradbury & Company, in the Clerk's Office of the District Court of Massachusetts."] Office of the *Boston Daily Bee*: May, 1857."

² See 4 Am. St. Tr. 100.

³ See 5 Am. St. Tr. 648.

⁴ DURANT, HENRY FOWLE (1822-1881). Born Hanover, N. H.; educated there and at Peacham, Vt. and private school in Waltham, Mass.; Grad. Harv. 1841. Studied law in office of his father and Gen. Benj. F. Butler who were in partnership then. Admitted to Bar, 1843; practiced 1843-47 at Middlesex bar; from 1847-63, member of Suffolk bar. In 1851 he had his name changed by Legislature from "Henry Welles Smith" to Henry Fowle Durant (Fowle and Durant being both family names). Member of Boston City Council, 1852. Upon death of his only son (1863) retired from law practice to devote his life to religion. Conducted evangelistic meetings in many towns in New England. In 1867, being chosen trustee of Mt. Holyoke seminary, became interested in higher education for women, and in 1870 procured charter from the Legislature to form a woman's college, giving his country estate, in Wellesley, and a large part of his means to erect Wellesley College, which was opened in 1875. Treasurer of board of trustees, until his death at Wellesley, Mass. In 1880, he erected the College of Music. See Lamb's Biographical dictionary of U. S., 1900; National cyclopaedia of

MR. DANA'S OPENING.

Mr. Dana: The libelant in this case, Mr. Dalton, is a young man, now in the twenty-fifth year of his age. He was born in Boston; has always lived here. He received a mercantile education and entered the counting room of Manning, Glover & Co., where he remained some eight years and bore a reputation of which any young man in the city of Boston might be proud. He became acquainted, in the city of Boston, with Miss Helen Maria Gove, a daughter of Mr. John Gove, of this city. He was attracted and fascinated by her when she was quite young, and he was quite young. On the 12th day of June, 1855, she being then not quite eighteen years of age and he but twenty-four, they were married.

At the same time he established himself in business, as one of the firm of Mudgett & Co., of this city—one member of the firm being an elder brother, Wm. T. Dalton, and the other, Mr. Mudgett. He began his business life at that time with every prospect of success. The reputation he had secured, his high moral character, his attention to business, gave him every prospect of success. They did not keep house—he being quite a young man, a beginner in the world; they went to board at a very respectable boarding house, No. 40 Summer street. Miss Helen Maria Gove, or as you will frequently hear her called in letters which will come to your notice, "Nelly," had an elder sister, Miss Fanny Gove, who married some years before Mr. Edward O. Coburn.

Mr. Dalton devoted himself, ardently, enthusiastically, as a young married man would, who had others to support and provide for beside himself—he devoted himself to business early and late, and his wife was left very much to herself; and not being a person of much culture, not having a taste for reading, and those other resources which enable a young woman to occupy her time profitably and agreeably, she was left very much to those chance occupations which might fall in her way; and I suppose there are in every large city, dangers enough attending the idle steps of a young married woman. About that time a young man by the name of William Sumner became acquainted with Mrs. Dalton. He was the son of

American biography, 1906; Harv. Univ. Cat. (1636-1915); Story of Wellesley (Florence Converse), 1915; Davis, W. T., Bench and bar of Massachusetts, 1895.

⁵ CHOATE, RUFUS (1799-1859). Born Ipswich, Mass. Ed. Adams Acad., Hampton, N. H. Grad. Dartmouth 1819. Studied law at Harv. Law School and with William Wirt (Wash. D. C.). Admitted to Mass. Bar 1823; practiced first at Danvers and then at Salem. Member of Congress 1831-1834. Removed to Boston, 1835. United States Senator, 1841-1845. Att'y-Gen. (Mass.) 1853. Member Const. Con. 1853. Died in Halifax on his return from Europe where he had gone in search of health.

a farmer in the back part of the town of Milford, in the County of Norfolk. He was first brought up in a provision store in this city; but desiring to change his position in life, he obtained the leave of his parents to give up his place in the provision store, and went to an academy to learn writing and bookkeeping, in order to fit himself for a mercantile situation in a counting room. This no doubt was an unfortunate thing, for it threw him upon the world with his time somewhat on his hands. He had a cousin by the name of Porter, a member of this bar, with whom he became very intimate, and from the latter part of September until the early part of November, he seems to have neglected very much his occupation at the Mercantile Academy, coming into the city in the morning, spending his whole day about town, and returning home usually at night. During this time Mr. Sumner and Mr. Porter became acquainted with these two ladies, Mrs. Dalton and Mrs. Coburn. Mrs. Coburn lived at No. 84 Shawmut avenue, and Mrs. Dalton, her husband being away during the day, spent much of her time at the house of her sister. Another house, 68 Shawmut avenue, was where Mr. John Coburn lived, the father of the Coburns, who is a master mechanic and builder in this city.

As I have said, Mrs. Dalton spent much of her time with her sister, Mrs. Coburn, and they both spent a good deal of their time in the streets and public places. They became acquainted with Mr. Porter and young Sumner. Mr. Porter became quite intimate with Mrs. Coburn, and Mr. Sumner with Mrs. Dalton. Step by step this intimacy increased, until at last they used to meet by appointment at Vinton's saloon on Washington street, and afterwards at the saloon of Mr. Fera on West street, in the afternoon. Mrs. Dalton went there by appointment and met young Sumner at certain hours; sometimes he waited for her, sometimes she waited for him; but they met. They used to walk together and ride together. Then a correspondence took place between them, and several letters passed. There was a young lady, a Miss Snow, who went to walk several times with Mrs. Dalton, and went to the saloon with her, and there met young Sumner. Mrs. Dalton read to Miss Snow parts of letters which she had received from Mr. Sumner, and Miss Snow also saw Mrs. Dalton pass a note under the table to Mr. Sumner, and request him not to let his friend Mr. Porter see it. At one time Mr. Dalton took her and Mrs. Dalton to the theater, and Mr. Sumner sat near them, passed them several times in the ante-room of the theatre, but was not recognized by Mrs. Dalton. The next step consisted in taking rides into the country, in company with Mr. Sumner, Mr. Porter and Mrs. Coburn. Then from riding four together, the next step was for Mr. Sumner and Mrs. Dalton to go together without the others, and visit several hotels—the Spring Hotel, and the large hotel at Brighton, known as Wilson's.

I am stating to you now, gentlemen, facts which have come to the knowledge of my client step by step, since the first discovery by him of anything out of the way on the part of Mrs. Dalton; but

all this time my client did not so much as know that there was a man by the name of William Sumner in existence. We shall show you that Mr. Sumner visited the lodging room of Mrs. Dalton at 40 Summer St., while her husband was occupied in his business avocations. Mr. Sumner also met Mrs. Dalton at the house of her sister, Mrs. Coburn, at No. 84 Shawmut Avenue several times, besides meeting her at saloons, and riding with her in carriages and visiting divers hotels in the neighborhood of the city; all this time my client not knowing that there was such a person as William Sumner in existence, and entirely unsuspecting of any evil; and we will show you that she desired Miss Snow and her friends not to mention the subject, and not to let her husband know that she was at all acquainted with Mr. Sumner.

On the evening of Friday, the 16th November, Mr. Dalton returned from his place of business to his boarding house in Summer street. His wife was absent, and had been all day. She told him in the morning that she was going to dine with Miss Emma Snow, and he supposed she had done so. On looking over some papers he found a letter which Mrs. Dalton had rather indiscreetly left in an exposed situation—one of the letters of Mr. Sumner to her. She had destroyed the greater part of Mr. Sumner's letters to her, and the greater part of her letters to Mr. Sumner she had obtained possession of and also destroyed. But by one of those fatalities by which crime is always discovered,—for no person can be skilful or shrewd enough to defy that Providence which ordinarily detects crime,—she had left one of those letters where Mr. Dalton could find it. Mr. Dalton saw it and read it; and, looking further, he found another letter and some verses of poetry addressed to his wife. He did not then believe that they were really sent to his wife by any man, and if she had come home and told him that she had got them copied for her own amusement, so entire was his confidence in her, I think there is no doubt he would have credited that story. She came home rather late, and tired. He showed her those letters, and, probably not knowing what more he might know, she admitted that those letters were written to her by Mr. Sumner, whose initials they bore. She denied, however, everything approaching to guilt, and excused and accounted for her acquaintance with Mr. Sumner and this correspondence with her. There was enough here to disturb the mind of a young and confiding husband, as you may well suppose. It was a blow, though not a fatal blow to his peace and happiness. She told him that it was only an acquaintance which she and her sister Fanny had in common with two young gentlemen—Mr. Porter and Mr. Sumner—which, of course, made her conduct more excusable and more plausible, if it was a joint acquaintance of two ladies with two gentlemen.

This did not satisfy Mr. Dalton, however, and he said he would go to the house of Mr. Coburn and inquire of Mrs. Coburn about the matter. He left, and went directly to the house of Edward O. Coburn, No. 84 Shawmut avenue. He found that the Coburns had

company with them in the parlor, but he called Mrs. Coburn out, took her into a room upstairs, closed the door, and had a conversation with her. In a few moments Mrs. Dalton arrived, having left her lodgings contrary to the request of her husband, who had asked her to remain at home. She strove to get into the room, made a great deal of noise, and called to her sister from the outside, and told her to be careful what she did. Any further inquiry of course then became useless, the door was opened, and all the parties came together. The husbands had no proof against their wives beyond the fact of a letter or two; and the ladies of course, having everything at stake, denied everything amounting to guilt, but admitted that it was a flirtation and impropriety, but nothing beyond that. This, of course, though it might satisfy my client and Mr. Coburn with reference to their wives, did not satisfy them with reference to the men, and they sought an inquiry of those gentlemen.

I don't know how far that unfortunate affair in Shawmut Avenue will come before you in this trial, but I suppose that much of the testimony will recur to that.

This was on Saturday, the 17th November. Long and painful inquiries and explanations took place between the two ladies and their husbands. The friends of the parties, the brothers, sisters, father, and mother, all intervened, and all interested themselves in favor of the reputation of the ladies. Under all these influences, my client was induced to believe, and did believe, that nothing had taken place beyond what the ladies had called a flirtation. He was attached to his wife, and he was unwilling, and he felt it indeed his duty, to refuse to do anything which should cast an imputation upon her character beyond what the unfortunate publicity of the circumstances had caused. All eyes were turned upon him; according as he should repudiate her or not would be her position. He determined not to repudiate her, having no evidence that would justify it, as he thought, though others might have viewed it differently.

The unfortunate death of Mr. Sumner led to a great deal of popular excitement, and my client, on the 11th December, some three weeks after this affair, was arrested on the charge of murder, and taken to jail, that not being a bailable offense. He remained in jail—and these dates may be of some importance to you—from the 11th December until the 13th January, a period of thirty-three days. During that time there was a correspondence between himself and his wife. Being there left to himself, and withdrawn from the immediate personal fascinations of his wife and the influence of her family, he had more time for reflection. Time also developed certain facts which never had come to his knowledge before. While he was in jail, between the 11th December and the 13th January, there came to light two letters, written by Mrs. Dalton to Mr. Sumner. The original letters she had destroyed, but copies had been preserved by a young man of the name of Gibbens, of this city, a friend of Mr. Sumner's, who being an expert penman, and well

acquainted with such phrases as would be likely to be used in a correspondence such as Mr. Sumner was carrying on, was employed by Mr. Sumner to write his letters to Mrs. Dalton. He showed Mr. Gibbens the letters of Mrs. Dalton, many of which he read, and he wrote for him at his dictation a great many of the replies—for Mr. Sumner did not think that his style of writing and his phraseology enabled him to do full justice to the course he was pursuing, and he therefore availed himself of the superior abilities of Mr. Gibbens. Now, these letters that Mrs. Dalton wrote to Mr. Sumner, being in the possession of Gibbens, he, for some reason which he attempts to explain, copied two of them; the rest he gave back to Mr. Sumner, and on the ride which took place the day before the 17th November, Mrs. Dalton got out of his pocket nearly all the letters she had ever written to him and destroyed them. We have made every inquiry to learn whether there are any original letters in existence which Mrs. Dalton wrote to Mr. Sumner, and cannot ascertain that there are, and as she attempted to destroy *all* the letters, it is probable that she did. But at this time, when my client was in jail on the charge of murder, these two letters, then in the possession of Mr. Frederick Sumner, were shown to him, by Mr. William Dalton, the brother of my client. These letters were of a pretty decisive character. Immediately on coming out of jail, he determined that he would not put himself under the influence of the fascinations of his wife, but that he would first ascertain what further evidence there was of her guilt, look his situation fairly in the face, and if there was evidence to satisfy him that his wife had committed the crime of adultery, then to repudiate her forever. He saw those letters and they disclosed other things to his knowledge. They showed him that his confidence in his wife's statements must be abandoned, for she had told him that she had written nothing to Mr. Sumner but ordinary formal letters which were of no consequence. These letters were very clear in their character, and these, together with the letters of Mr. Sumner, and various other facts that pressed home upon him, forced him to the conviction that his wife was guilty; and he then determined that he would repudiate her entirely; that he would have no further connection with her, and from the hour when he went to jail on the eleventh December, he has never seen her or met her except accidentally—of which there possibly may be some evidence. He came out of jail on the 13th January; the Grand Jury having found that nothing more could be brought against him than a charge of man-slaughter, and they indicted him for that and for assault and battery, to be tried before the Municipal Court. He offered to plead guilty to the charge of assault and battery, but this offer was not accepted and he was tried for man-slaughter on the 24th January. The trial lasted eight days, until the 2d February, when he was acquitted of the charge of man-slaughter, and found guilty of assault and battery. He was not sentenced until the 5th day of March, when he was sentenced to five months' imprisonment, or until the 5th August, which term he

served out. Somewhere about the 20th February, another fact came to his knowledge which put an end to any remaining struggling doubt that might have existed in his mind. We shall show you, gentlemen, that Mrs. Dalton, being pregnant, on or about the 12th February—and that is connected with her own confessions in such a manner that it becomes unavoidable evidence in this case—and fearing that the birth of her child might add to her husband's suspicions with regard to her position with Mr. Sumner, and having, from certain evidence very clearly to be produced before you, stated that she could not tell who was the father of the child—to secure herself from that shame, abortion was produced upon her, with the knowledge of some of her family, through the instrumentality of a low physician of this city, between the 8th and 12th February, partly by the use of instruments, and partly by the use of hot drinks and hot baths. The foetus was shown to several physicians, for the purpose of fixing its age as nearly as possible. It was impossible that such a thing should be entirely unknown to the persons in the house. I ought to have stated, gentlemen, that immediately after the affair of the 17th November, public attention had been so drawn to it, that it was not thought expedient for Mr. and Mrs. Dalton to remain at the boarding house, and they therefore went to live at the house of Mr. Wm. Richardson who married one of the elder daughters of Mr. Gove. But when Mr. Dalton went to jail, Mrs. Dalton went to live with her sister Mrs. Coburn, at 84 Shawmut Avenue; and at the time this abortion was procured, Mrs. Dalton and Mrs. Coburn were together and Mrs. Gove, their mother, was there a good part of the time. There was also a nurse there, a Scotch woman, named Mary Hunter, who was a good deal in the confidence of the family, and this thing was known to her, and she was present when the child was taken away, and also procured medicines which were given to Mrs. Dalton. This became known, and my client could not long remain in ignorance of the fact.

Such a secret could not long be kept, and when it became known, I suppose the Gove family attempted to have it believed that it was a premature birth, not an abortion. Still, gentlemen, my client having determined not to live with his wife, but to procure a divorce, the Gove family made very strenuous efforts to induce him to overlook everything and return. The Coburn family also had the same feeling. Mrs. Fanny Coburn was naturally very desirous that the whole matter should be passed over, that her husband should overlook everything that she had done out of the way—and how far she had gone is none of our business here—and she was exceedingly desirous that her sister's reputation should be preserved, and that Mr. Dalton should return and live with her. Nor did the members of the Coburn family believe in the guilt of Mrs. Dalton, or even if they did, they were desirous that Mr. Frank Dalton should overlook it, that he should return to her, that there should be no publicity given to the matter, but that the whole affair should be wiped out, and everything go on as before. Every effort was made

to induce Mr. Dalton to take this course, but he refused. He used to go to see Mr. E. O. Coburn at his house in Shawmut Avenue, and the Coburns and Mrs. Dalton laid a plan together, to bring about a meeting between Mr. Dalton and his wife there, he having refused to meet her at all; so one evening when it was known he was to be there to meet Mr. Coburn, Mrs. Dalton went directly up to the room which he occupied in the fourth story, the others immediately went out, and she was left alone with her husband. He refused to see her, but she made every effort that a wife could make to induce him to do so, and they finally had an interview. In that interview, she, knowing how much he had discovered, knowing that he had determined that he would not receive her again, confessed distinctly and unequivocally her act of adultery with William Sumner. She stated all the alleviating circumstances. She was exceedingly overcome, with tears. They had a very long and a very painful interview; he brought up the matter of abortion and she said she was induced to do it by others, that she did not wish to do it herself. She told him she had been guilty but once with Mr. Sumner, and never with anybody else, and then stated circumstances tending to show that it was a sudden overcoming of passion with no intention on her part. The time was the very day, the 16th November, when she returned late to her lodgings, and when her husband made his first discovery. She said she spent the entire day, from 8 1-2 o'clock in the morning until four o'clock in the afternoon, in company with William Sumner, riding in the neighborhood of Boston and visiting at least two hotels; that in a bed-room of a hotel, under the allurements and excitement of wine and his company during the whole day, she at last yielded. She begged forgiveness, promised amendment, and everything that a woman could, who had still some affection for her husband—for at this time her affection for him had not wholly departed, though the evidence will tend to show that afterwards her love changed to hate, and that she even wished that Sumner would return from the grave, that there might be some person whom she could love; but my client was firm in his resolution to secure his own self-respect against the solicitations and blandishments of his wife and refused to extend pardon or condonation to her; told her that all efforts were vain and that his course was plain; so it ended. She returned home and stated that she had told her husband all and that he had refused to forgive her. The next day he received a letter from her which you will see, in which she alludes to her guilt with Sumner and says she fell in a moment of temptation, thus making one more effort to secure condonation but without success. On March 5 he went to jail on the sentence for assault and remained there until August 5. While there, about March 12 he filed this libel for divorce.

THE WITNESSES FOR THE LIBELANT.

William T. Dalton: Am a brother of the libelant. Had an interview with his wife a week after the Sumner assault (see *ante* p. 520). Know her handwriting and can swear these letters of hers are written by her. My brother did not know of some of Sumner's letters when he went to jail. Mrs. Dalton made some statements to me in regard to her conduct for some five or six weeks previous to the flogging affair; she spoke of having made the acquaintance of Sumner and Porter at Vinton's saloon; that she and Sumner met there several times and then concluded to meet at Fera's; that she and her sister, Mrs. Coburn, went there nearly every day; that she had written Sumner several letters, which letters she had taken from his pocket and destroyed as they were riding over Cambridge bridge. I had the letters (see *post* pp. 599-601) and asked her if she knew the contents and she said she did; said the letters were given her by Sumner. Spoke of a carriage ride which she and Mrs. Coburn and Porter and Sumner had, where they had gone to visit a sister at Cambridge. Said the carriage came up to them when they were a short distance from her sister's house and she objected to getting into the carriage but Mrs. Coburn insisted that she should. Supposed she was going to Boston but found they were driven to Brighton. The coachman got down when they were there and said his wheel was broken and must be

repaired. They got out and went into a hotel and had wine and cake. She said in answer to the question what they were doing there, that Mrs. Coburn and Porter were having a good time on the sofa. She said no improper liberties were taken with her; said she supposed she knew the object the men had in taking her there. She described the hotel as having blacksmiths' shops opposite. After stopping at the hotel they again got into the carriage and were driven to Boston. She spoke of a ride with Sumner in a chaise or buggy; said she met him on Harris avenue and drove to Brighton and stopped at two hotels. She offered as an excuse for stopping at one of the hotels, that Sumner wanted to water his horse; she made no excuse for stopping at the other. She did not have any clear idea of where the houses were except that they were in the direction of Brighton. Said Sumner had given her a copy either of Campbell's or Scott's poems, I could not say which, and a ring at her room. She objected to taking the ring but he said if she did not he would throw it into the fire, and she took it. Said she did not give him a ring but loaned him one. Said she met Sumner by appointment at Fera's saloon afternoons; said she was wholly innocent of any criminal acts. I never had any other conversation with her in regard to these matters.

My brother is about twenty-five years of age. He was mar-

ried in June, 1855; went into business at the same time. Previously he had been with Manning, Glover & Co. eight or ten years. Never heard anything against the character of Mrs. Dalton until the 19th November.

Cross-examined: This interview was at my house; she came with her husband. Can't say she expressed much sorrow; there were no tears shed; she protested her innocence. Think she made no excuses—did not undertake to account for her conduct. She answered every question freely and fully; think she said she declined to get out of the buggy but he said it was necessary as the horse must be watered and somebody was standing at the door and told her she had better get out, and when she did so he showed her to the parlor; don't think the time they staid there was mentioned. At the time of the chaise ride alone with Sumner she said she stopped at two hotels; said they started in the forenoon; said she met him on Harrison avenue; did not say the meeting was accidental. Said she objected to getting into the chaise. No reason was given for getting in except that he persuaded her to get in. After this interview Mr. and Mrs. Dalton lived together with Mr. and Mrs. Richardson until he was arrested for murder; Mrs. R. is Mrs. Dalton's sister. They spent Thanksgiving at my mother's house. Think Mrs. Dalton was in her 18th year when she was married. Don't recollect any papers were shown to Mrs. Dalton at that interview. I held the let-

ters in my hand; did not read them to her. I spoke of the letters as being strong love letters and mentioned some passages in them. She seemed to admit they were love letters. Have seen the book Sumner gave her; do not know where it is now; think it was a copy of Campbell's poems. Said she had not given Sumner a ring but had loaned him one; said she loaned it to him in her room. Do not think the question as to whether the ring had been returned or not was asked. Received the letters from my brother; he had probably read them; he lived with Mrs. Dalton after that until he was arrested—about three weeks. He now lives at my mother's.

Miss Abby Dalton: Am a sister of libellant; was present at an interview with her at mother's house; recognize these letters. Mrs. Dalton admitted having received the letters from Mr. Sumner; she said the verses he gave her during one of his visits at her room and he asked her if she would accept them; she said the letters were put into her hands by Mr. Sumner; said that they had been in the habit of meeting at a confectioner's; that she had written him some letters and he had written her several; she said she had been to ride with him; he had given her a book; that one day when they were at the saloon, she took off a ring that was her husband's because it was heavy and put it on his finger and that he gave her a ring afterwards; said that on the way to visit a friend in Harrison avenue, Mr. Sumner came up to her

in a chaise and persuaded her to get in and they went out to the same hotel which they had visited before with Mrs. Coburn and Mr. Porter; she did not offer any excuse about the letters but asked if Mr. Sumner did not say in one of the letters, "Is not our love as free from impurity as that of an angel?" She wished it understood that she solemnly denied all guilt.

I saw the book—Campbell's poems—at her house before I knew Mr. Sumner gave it to her. Said she had been trying to bother Frank about it and a ring she showed me on her finger and make him believe a young man gave them to her; said, "A young man did give them to me." Showed me her name in the book, and asked me if it was not beautifully written.

Cross-examined: She said that on that drive she tried to get her letters from Sumner; tried so hard that she tore his pocket but she did not get all; what she got she tore up; the letters of Sumner were found in her bureau drawer. My brother William asked her how she came to save these two when the others were all destroyed; she did not give any reason but he suggested that they were perhaps too expressive for her to wish to destroy them; my brother asked her if she knew the intentions of the men in taking her and her sister to a hotel and she said she did. But, said he, notwithstanding this, you

went there alone with Mr. Sumner the next day and she admitted that she did. We asked her how she could account for her behavior and she said she could not account for it in any way. She objected to answering some of the questions but my brother Frank told her she must tell us all she had told him. No one asked her any questions but my brother William. She insisted strongly upon her innocence. She gave us to understand that she had been indiscreet. She blamed Mr. Sumner and Mr. Porter and her sister Mrs. Coburn for leading her on. She admitted that she had done wrong. She said that night at our house with her husband and after that they lived together at Mrs. Richardson's.

Elizabeth Powers: My mother did washing for the Daltons and I went there twice a week; took at different times two notes from Mrs. Dalton to Mr. Sumner; one I brought back as she told me, as he was not at the Mercantile Academy.

Charles French: Keep a writing Academy; William Sumner was a pupil; he left in March 1855; he read me some love letters one day.

Fred. A. Sumner: Am a brother of William Sumner; at his death there were among his papers no letters from Mrs. Dalton; there were some copies of letters from her.

Mr. Dana here read the letters referred to above.

Wednesday A. M.

My own sweet Nellie: Your note of Tuesday is now before me; every word has been read ten times over. How can I ever repay

you for the affection you have lavished upon me? Will a whole lifetime of unceasing devotion add one ray of happiness to the sunshine of your existence? If so, behold in me one who will never cease yielding you his heart-felt, fervent love; a love as free from all impurity as that of an angel; as elevated above all earthly considerations as the heavens are above our heads.

My best beloved dearest Nellie, forgive me if in a moment of thoughtlessness I have said or done aught that could wound your feelings; forgive me if the excess of my love has caused me to express myself too warmly.

My own Nellie, if you experienced the perfect agony of love which thrills my breast you would be able to overlook all the indiscretions into which such an ardent passion might lead me.

Dear Nellie, I cannot much longer support this unspeakable pain—this sinking of the heart—this burning of my brain, this tension of every muscle, and fullness of every vein. My mind is confused and my whole system seems burning with a liquid fire. Dear Nellie, it is you and you alone who can allay this agony; you, if you will, can bid these fires to burn more brightly and yet less consumingly; you can still the overwhelming tempest of my passion and soothe my troubled brain; and will you not, Nellie, after teaching my heart to love, will you not let it feed upon love or teach it to cease loving, for it must do one of these—either possess you entirely, or else think of you never again.

Nellie dear, appoint some time when we can meet and be alone, free from disturbance where I can pour into your ear what I cannot express by my pen. Do this Nellie and trust me when I assure you of my unwavering attachment.

Thursday, 15th-55.

My charming one; Yours was full of all I could wish. Your expressions of confidence have not added to my already devoted love, for that was impossible, but you cannot conceive with what pleasure I read such evidence of your sincerity. Sweet child, may I never prove treacherous to one who is apparently so fond of me. You say, "I must be tired of your foolish notes." Now what induced this supposition? Have I ever expressed myself in such a manner as has indicated that I have ceased to be interested in all that pertains to the love you bear me?

If I have, I am unaware of it and beg you to forgive me; for never, whilst I live shall I cease to hold you in the highest and most affectionate regard. Dear child, you leave the appointment to me. How can I answer you, My inexperience has hitherto never rendered it necessary to pursue such a course and therefore I feel a certain degree of bashfulness in assuming the dictation, fearing that you may refuse or disagree; but if we can ride out together we may then converse perfectly at our ease. Will that course be agreeable to my own best beloved one, or if not, will she give any orders relative thereto, to her most faithful and affectionate

W. S.

METRICAL LOVE LETTER.

Fly from the world, Nellie, with me
 You will never find any sincerer;
 I will give up the world O, Nellie, for thee
 I can never meet any that's dearer.

Then tell me no more with a tear and a sigh
 That our love will be censured by many;
 All have their follies, and who will deny
 That ours is the sweetest of any.

When your lip has met mine in communion so sweet
 Have we felt as if virtue forbade it?
 Have we felt as if heaven denied them to meet?
 No rather 'twas heaven that did it.

So innocent love is the joy we then sip
 So little of wrong is there in it,
 That I wish all my errors were lodged on your lip
 And I'd kiss them away in a minute.

John Burns: Am a hackman. A year ago last August was hired by Mr. Porter and Mr. Sumner; they told me to drive slowly. We stopped before a house and two ladies came out and got in. They told me to drive round by Brighton to Boston. We stopped at Burlingame's hotel. The day was warm and I thought with a party of ladies and gentlemen out for pleasure, we ought to stop at a hotel and I said one of my wheels wanted oiling; they went in at the front door and remained there almost three-quarters of an hour; then took them in and drove to Boston. Got into Boston about eight. Did not know the ladies then but have since learned they were Mr. Gove's two daughters. They seemed to be a jolly party, laughing and having a good time. A lady and gentleman sat on the front seat and a lady and gentleman on the back seat. Could

not see into the hack coming home for the window was closed; believe I closed the window myself. Left Mr. Porter and the lady on Dover street and then drove down Washington street with Mr. Sumner and the lady, but Mr. Sumner told me not to go on Washington street but to drive down Harrison avenue. Left them on Kingston street.

Cross-examined: The carriage was a closed one. Every time I noticed the windows they were open. Asked the party if they were going to stop anywhere when I told them that the wheel needed oiling and then they said they would stop at a hotel. Drove up to the door as soon as the carriage was fixed. A boy came with a message for me to come up to the door as soon as the carriage was ready. Heard the laughter and the talking on the box. There were three windows open on the way from Cambridge

to Brighton and two open on the way from Brighton to Boston.

Emma M. Snow: Was living in Boston in 1855 and was a friend of Mrs. Dalton; often went out with her. Was with her in company with Mr. Sumner; several times at Vinton's saloon. Saw letters which she said were from him; once she passed a note to him; she told him not to let Porter see it. I read some of the letters but cannot remember much of their contents except detached expressions. One commenced, "my adorable." Have not known them to meet anywhere except at Vinton's saloon; when she passed the note she beckoned him to come to her from the other side; he came and I left my seat and gave it up to him; she passed the note under the table—not openly. Recollect seeing Sumner at the Boston theatre when I was in company with Mrs. Dalton and Mrs. Coburn; he sat some six or eight feet from us; did not see them recognize each other in any way. Between the plays we walked together in the ante-rooms; Mr. Sumner also walked there but Mrs. Dalton did not recognize him; heard her say that she had notes and bouquets from him and that once she sent one back; never heard Mrs. Dalton say anything about a ring in connection with Mr. Sumner. Heard her say she received a book from Mr. Sumner but do not know what it was; she said her husband did not know Sumner and she'd not like to have him know she did. She usually went to Vinton's saloon at five when Sumner met her; it was between

the middle of October and the 16th November that she told me what I have narrated.

Cross-examined: I told Mr. Gove I had seen nothing improper in her conduct; don't remember saying I was proud of her acquaintance. Never heard of her going to a bagnio.

Catherine Reynolds: I carried a note from Mrs. Dalton to Mr. Sumner at the Mercantile Academy; he was not there and I brought it back as she told me; Mrs. Dalton did not know Sumner until the end of October.

Agnes Keenan: Was employed at Fera restaurant and confectionery in 1855. Went the last part of October; knew Sumner and Porter; Mrs. Dalton and Mrs. Coburn came there then, and until Nov. 17; they came the latter part of the afternoon; they had refreshments; sometimes stayed half an hour, sometimes not so long; they always went out together two or three times a week. Never saw either of them there alone without the other. There is a front shop to Mr. Fera's establishment and a saloon which is separated by folding doors; there are five tables in the saloon; sometimes these parties sat in the inner and sometimes in the outer saloon; the doors were open at such times; they are only closed for private dinners; do not know that these parties have had dinners there.

Cross-examined: There were usually other customers when they were there; saw nothing improper in their conduct there. Mrs. Fera and myself were the only waiters; they never stayed very long but sometimes it was

dark in the street when they left.

Mrs. Fera: My husband keeps the restaurant mentioned; recollect the four parties just described; they began coming the last of September and stopped the middle of November; they did not come every day but about two or three times a week. They took ordinary refreshments; saw notes pass between them.

Cross-examined: The saloon was open the whole length so that I could see what was going on in the back dining-room; the place was much frequented and people from the kitchen were constantly passing through; it was impossible that anything improper could have taken place and not have been seen.

April 15.

Granville Withington: Saw William Sumner with Mrs. Dalton in Vinton's saloon in the summer of 1855. Mr. Porter and her sister were with them. Have seen them together also at her house in Summer street; was on the opposite side of the street; she was sitting at the window and Sumner apparently sitting at her feet; it was between nine and twelve in the morning; don't recollect of seeing them together at any other time; never saw them together in the evening to my knowledge.

Mary Hunter: Lived in the family of Edward O. Coburn in 1855; was there at the time of the flogging affair. Twice Mrs. Dalton called and then in a little while Mr. Sumner. Once when Mr. and Mrs. Dalton were there she showed him a ring and said, "It's a fellow's ring" and then

immediately, "No it's Emma Snow's ring." Afterwards she said to me, "It's Mr. Sumner's ring, but don't tell my husband." The evening before the flogging Mr. Dalton came to the house; Mrs. Dalton came in after; she asked me where Mrs. Coburn and her husband were and I told her they were upstairs; they were in the spare chamber. She tried to get into the room; called to her husband to open the door and said, "Damn you, open the door." She pounded on the door with a piece of iron or a bed-screw; she spoke to Mrs. Coburn and told her to be careful what she said to her husband and that he had got nothing out of her. Did not hear Mrs. Coburn's reply; the door was then opened and the party had some conversation. Mrs. Dalton said to me Frank was not her husband and she did not care anything about him. One day Mrs. Dalton said to me that she loved Mr. Sumner and did not care if Frank was struck dead. Mr. Dalton was present when she said that; she said when Mr. Coburn and Mr. Dalton went out that she wished a dagger was through her husband's heart before he came in. Some time after Mr. Dalton sued for divorce I said to Mrs. Dalton that I did not see how Frank could get a divorce because no person saw them in the act and she said that nobody could see her because the door was locked and she looked around and under the bed and there was no person in the room. Mr. Sumner took off his coat, locked the door and wanted her to go to the bed.

She did not say whether she did or not; think she said this was at Brighton at a hotel. Mrs. Dalton said when her husband was sentenced she wished that he was sentenced for seven years, or for life.

Saw Mrs. Dalton taking hot baths a few days before her confinement and her mother fixing medicines for her. She went out a few days before with her mother; do not know where they went; she took some hot baths and hot drinks; her mother gave her hot drinks; I understand it was to bring the child forward; her mother said she was giving the drinks for that purpose. Mrs. Dalton came in one day where I was and said she did not seem to get ahead as she wanted to; she said she'd either parboil herself or bring it along. I was sent out for medicine; don't know what I got, except some savin which was steeped in hot water and Mrs. Dalton drank it. Mrs. Gove, Mrs. Coburn and I were present at the confinement. The dead body was kept in the house for some days. Mrs. Gove told me her husband took it away in a cigar box. Mrs. Dalton said to me that Sumner said that if the baby was a boy to name it after him.

Cross-examined: Am I a married woman? That's my business. Met Mr. Dalton at a lawyer's office after he came out of jail; he told me to tell all I knew and I said I would tell the whole truth. Don't remember he dusted a chair for me to sit on; he always treated me civilly; never gave me any money; never told Mr. Richardson if I

was called to court I could tell something which would shame him for life. "I had a devilish good time" were the words she used in describing her drive with Sumner; and to her husband, "damn you, open the door." Don't say she was a swearing woman but once in a while she would blow off steam; have heard her swear at her mother; have not told this story before; did not in the Municipal court because I was not asked. That night they occupied the same room she and her husband, it was the only one they could. Don't wish to say where I live now as the folks don't want their names connected with this case.

Dr. D. H. Storer: Last February Mr. Gove brought me the foetus of a child; he said he wanted an opinion as to its age; I came to the conclusion from 18 to 19 weeks; I handed it over to Dr. Jackson.

Cross-examined: It is a common thing for a woman to have a miscarriage without the attendance of a physician. There was no unnatural appearance about the foetus; agitation is a common form of miscarriage and very likely to occur to a woman under the circumstances that Mrs. Dalton was at the time. Was called later to see her for inflammation of the breasts. There were no signs in her symptoms of attempted abortion; baths and hot drinks would have a tendency to produce abortion; Savin is one of the medicines which would be likely to produce abortion.

Edwin O. Coburn: Married Miss Fannie Gove, a sister of

Mrs. Dalton, in the fall of 1855; lived on Shawmut avenue. After the cowhiding affair went to live with my father; was in Mr. Gove's employment; on the evening of 16th November Mr. Dalton came to my house; a little later Mrs. Dalton came in and wanted to know where her husband was; told that he was in conference with my wife up stairs; she went up and I presently heard a loud thumping at the door upstairs; I went up and found Mrs. Dalton there with a bed-screw in her hand; the door was a great deal bruised; she called to her sister to open the door but the violent pounding had so sprung the door that it was a very difficult thing to open it, but finally the door was opened and Mr. Dalton and my wife came out; there seemed to be a good deal of excitement. Mr. Dalton seemed to be laboring under severe agitation; he had papers in his hand, letters and poetry, signed "W. S." I read them that evening. This was the first intimation I had of anything of the kind. Mr. Dalton asked his wife if she had other letters and she said no. He asked her if she had written to Mr. Sumner; she was reluctant to admit it at first, but she finally acknowledged that she had had a correspondence with him. He entreated her to tell him all, but she was rather obstinate; finally, however, she told him if he would retire with her she would tell him all. She gave me an account of the origin of her acquaintance with Porter and Sumner. Said that one afternoon while she was out with

her sister they went into a confectioner's saloon; that there they met Porter and another gentleman; that Porter slightly recognized Mrs. Coburn; then they went out and took an omnibus to ride home; that presently Porter and Sumner got in, and Porter kicked Mrs. Coburn's foot; that they felt themselves insulted and got out, stopped at a store and waited for another omnibus; that when they got up to Boylston street in this omnibus the same gentlemen got in and Porter apologized for his rudeness and Mrs. Coburn said she had not noticed it; they rode up to Union Park when they all got out and Porter walked down street with Mrs. Coburn towards her house; and that Sumner and herself got into an omnibus and rode down Washington street as far as Summer street when they got out and went into a confectioner's shop. She said Sumner wanted her to make an appointment to meet him but she refused. He then told her that Porter had engaged to meet Mrs. Coburn and she told him Mrs. Coburn was a married woman and she herself was a married woman and could not submit to such things and that Mrs. Coburn should not meet Porter. This conversation took place that evening. The next morning we had a further conversation. Mrs. Dalton said that they concluded not to keep the appointment which they had made and they did not meet that time, but afterwards they met. Mr. Porter said he should claim Mrs. Coburn's acquaintance on the strength of an introduction which he had to

her at a military ball about a year before; he said he had some important information to give her, and Mrs. Coburn asked him to give her the information then, but he declined, saying that he could not tell her in the presence of her sister. She replied that whatever could not be told in the presence of her sister she could not listen to; then they went out of the saloon and the gentlemen got into an omnibus with them without solicitation on their part and rode up to Dover street when she and her sister got out. Mrs. Dalton said that they met the gentlemen afterwards at Vinton's and at Fera's saloon. After that Mrs. Coburn was taken sick and she said she visited her frequently and they then agreed that the intimacy with the gentlemen should stop where it was. I asked her if she met the gentlemen while my wife was sick and she said she had not seen them much.

Mr. Dalton and myself then concluded that we must have the gentlemen see our wives and tell their story and at our request our wives wrote notes to the gentlemen asking them to meet them the next day.

(The witness here described the coming of Porter and Sumner to his house and what took place there. See trial of Coburn and Dalton, *ante* p. 520.)

Mr. Dalton offered to read these letters but his wife would not let him. He said he found them in a bureau drawer and that he had read them. I think she replied she was a great fool; if she left them where she put them in the first place, it would

have been all right. She said she first put them in the Bible, and afterwards under her wedding clothes. Mrs. Dalton said she did not want to hear them read for she had read them herself. She said if she could get hold of them she would destroy them. Don't recollect what was said about the poetry.

April 17.

Mr. Coburn: Had a number of conversations with Mrs. Dalton after that; she always protested she was innocent of any crime. Just before we were arrested she came to my house and said she had been to Mr. Dalton senior's house (her husband had left her a day or two previous and gone to his mother's in Indiana Place). She said she went there to see her husband and have him come back to her; that he would not agree to live with her, and that he refused even to get her a hack to come home in; that William Dalton came to the house 84 Shawmut avenue with her; that she feared Frank was determined not to live with her; she said that it could not be on account of the difficulties with Sumner for he had forgiven that; that she could not understand why he would not live with her. She wished me to use my influence to have him return to her.

After Mrs. Dalton was confined at the Gove house where I was living, I went into her room, she asked me to look into a drawer in her bureau; I looked into that drawer, there was a foetus of a child there; I think it laid on cotton. Mrs. Dalton asked me if I did not think it looked like Frank. The

only reply I made was that "it was a wicked shame" and left the room much displeased. Mrs. Dalton asked me to remain but I would not; I was there only a moment or two. I think Miss Hunter was there with my little boy, but am not sure. Have stated all the conversation that took place at the time between Mrs. Dalton and myself.

A few days afterwards I went in and was left alone with Mrs. Dalton; this was after Mrs. Dalton was able to sit up; she said she had understood from Mrs. Coburn that I was much offended and blamed her. She said before that she knew from what my wife had told her that I was aware that abortion had been produced; she said she did not wish me to blame her—that she would never have had it done had it not been for her father and mother; she said her father thought that if the child was born and Frank refused to acknowledge it, it might be a disgrace and her father wished to have the operation performed; that she went at their request and not at her wish; that she would have been delighted to have had the child born a natural birth as it was a boy; she told me that Dr. Calkins of Pleasant street performed the operation; said she was sorry it had been done and that she was sure she would not have had it done had it not been for others. I asked her if there were instruments used, and she said that there were but they did not want any one to know it.

Mrs. Dalton was anxious to meet Frank again. She did not

tell me anything more about the operation; she said it was performed at the doctor's office in Pleasant street; that she went with her mother. Though I had told Mrs. Dalton that Frank would not meet her, she implored me so often that I arranged one; or rather I got my brother to come to the house where she was; he did not know she was there; he said he did not like to have me serve him such a trick; he said I had promised to let him know if she came there; he was quite indignant and wanted to leave but I persuaded him to stop. Mrs. Dalton said she wanted him to stop and explain things to him; she said she wanted to relieve her mind and tell him all; she seemed very much affected and nervous and began to cry as soon as she went to the room. I advised her to keep calm and explain matters as they were and not to deceive him; I then left the room.

Mr. Dalton stayed with her till about nine o'clock. I asked Mrs. Dalton if they had come to a reconciliation and she said they had not; she said she had relieved her mind and told him all. She said she thought she should meet him again in a few days at her sister's, Mrs. Richardson's.

The next time I saw her was the day after; she said she was going to Mrs. Richardson's and I told her that Mr. Dalton was not to be at Mrs. Richardson's; that he had concluded to send for his things by a porter and would not meet her there. Had seen Mr. Dalton and told her that from him.

The matter of the abortion was spoken of several times in the presence of Mrs. Gove; she said Frank could not say it was Sumner's as it was a 6 months child; have heard Mrs. Dalton use strong language; heard her use the word "damn" and "devil," but only when she was excited. She is of a very excitable temperament, but the excitement is transient. Remember her saying on one occasion that she wished the damned men were both in their graves before she saw them for they had caused her suffering enough; Mrs. Gove was then present. Another time when Mrs. Dalton had promised to go out to ride with me and show me the hotels where she went Mrs. Gove objected to her going out so soon after her confinement and after some talk Mrs. Gove said she thought the devil had got into Nellie; and Nellie replied that the devil had got into her. Mrs. Gove said she did not see how anybody would or could live with her and that she had brought disgrace upon her family. Nellie replied that opposing

her was no way to reform her and she might bring greater disgrace upon them.

Cross-examined: I asked Mrs. Gove if she was not afraid it would take Nellie's life to attempt to procure an abortion at that stage; she replied that she was not, as she had seen it done a good many times. Mrs. Gove is my mother-in-law. I did not ask her where she had seen these operations performed; it was not necessary for she had urged me to have the same operation attempted on my wife, but I refused.

Don't remember that Mrs. Gove wanted the operation performed on my wife more than once. Was aware that she had seen the operation performed five or six times on one of her daughters; it was quite a common thing, I understood. Have no disposition to injure Mr. or Mrs. Gove or Mrs. Dalton except so far as the truth may injure them; would not say anything to injure them under oath that was not true; would not exaggerate anything.

Mr. Durant: Are you ready to acknowledge that you stole \$1700 from your father-in-law's safe? I do not consider I stole it; if you will let me make an explanation I will answer the question. Did you steal \$1700 from your father-in-law? I will answer if I can explain. Not the 99th part of a hair. It is some times called conveying. Did you convey \$1700 from his store? I do not consider I stole it. Was it at night, It was after the store was shut. Your Honor can I explain?

THE COURT: Yes, after you have answered the question. If you decline, that is the end of it.

Coburn: I carried the money to my house. I got into the safe with Mr. Gove's key which I found in an open private drawer; it was after the store was closed; the gas was burning. Your Honor may I explain now?

THE COURT: You may.

Coburn: During a few weeks after this transaction of the 17th November my feelings were at such a stage that I cared not what became of me. I was willing to die. All that was dear to me appeared to have been taken from me. My wife, in whom I had always placed the most implicit confidence, had held clandestine meetings with Josiah Porter, a member of this bar. I had never seen this man; I never knew him; the first intimation I had of her acquaintance with him was on the night of the 16th November. I was happy until that hour with my wife, except occasionally, for a part of two years when some trouble was caused by the interference of Mr. Gove in my domestic affairs. When I found my wife had fallen into the evil hands she had, I went to her like a man, like a husband and asked her for the whole truth. She gave me what she said was the truth of the affair. Mrs. Dalton gave a different report of it—they did not agree. I felt that there was something worse than I knew. I was desperate. I had been arrested for the assault on Josiah Porter and unfortunately my father was away from the city. It was necessary that I should call upon those by whom I was employed to bail me. Mr. Gove was away. He was boarding with me. When he went away he was indebted to me a small sum for board. I had made arrangements with that man—mostly for his accommodation—to take orders on different parties for provisions for the use of the house with the agreement that the amount

should not exceed ten dollars a week and with the understanding that it should be paid for in board. Before he went away we had a difficulty and he had spoken to me but seldom for some little time. He went away and I found that instead of keeping faith with me in not charging me more than \$10 a week for what I had bought he had charged me a hundred dollars more and that my account was thus overdrawn and I was left in his debt. I had no means; I had his wife to support; my father was away and I could not get means. I applied to Mr. Whitten, one of the members of the firm of John Gove & Co. He gave me a small sum—I forget what it was—but it was enough to make me feel keenly my unfortunate position. These difficulties, coming upon me as they did and my loss of confidence in my domestic affairs caused me to take that step which I shall ever regret and which has cost me much suffering and pain. I did go to the store of John Gove with his keys and took from his safe \$1700. I know it was a wrong act, but I had been there before by the orders of Mr. Gove to get money for himself. I was in an embarrassed situation and I pursued a course that I knew was not right. The first opportunity that was given to me, I laid the whole thing fairly before them under the promise that nothing should be said about it, that I should go back to work with them, that the matter should not be spoken of and that no action should be brought against me. Under

these promises I frankly acknowledged that I took the money and returned the balance.

I know and am willing to acknowledge before these gentlemen that I did wrong; I regret it. I did not wish, gentlemen, to appear in this case. I have taken all honorable means to be released. When Mr. Gove came home he had me arrested and I was indicted by the Grand Jury. I begged to be discharged and Mr. Gove after much solicitation agreed to discharge me from all obligations for that affair. Every dollar of that money was returned. All I have to say is, that I regret it and have done what I could to atone for it. I did not want \$1700. I did not know how much I took; I took the first I laid my hands on and without counting it; to pay for the support of Mr. Gove was no part of my object in taking the money. I had been in debt, through my own extravagance and folly, and this with the conduct of my wife caused me to take it; I took it to protect myself; I cannot tell exactly what my motives were; I had wild ideas at that time. One of my objects was to protect myself against the charge of an aggravated assault and battery.

Cross-examined: Never said I would be revenged on Mr. Gove and his family and never had any such feeling. I never told Mr. Gove that I would pull him and his family down. Mr. Gove told me that if I ever appeared upon the stand against his daughter it would be a sorry day for me, and I replied that I should protect myself by

every means in my power if I was assailed. I never said I should accuse Mr. Gove of procuring abortion if he assailed me, nor that I would accuse his daughter of adultery.

Remember the visit of the city missionary to the jail where I was; do not remember telling him I knew nothing against the chastity of Mrs. Dalton.

Dr. J. B. S. Jackson: The foetus given to me by Dr. Storer, I considered its age from 4 to 5 months. Did not know whether it was a natural or unnatural miscarriage; if instruments had been used some external injury would have been visible.

April 18.

Adeline Coburn: Am sister of the preceding witness. Prior to November, 1855, heard of no intimacy between my sister-in-law and Porter and Sumner. Remember the evening Mrs. Dalton came into the house and Mrs. Coburn was called out of the room; Mrs. Dalton went upstairs and asked to be admitted to the room where Dalton and Mrs. Coburn were having a private interview; she said that if they did not open it she would break the door; she told Fanny (Mrs. Coburn) not to tell Frank (Mr. Dalton) anything, because she had not; she passed by the door where I was and soon returned with a piece of iron with which she hammered on the door, making a loud noise.

She used profane language in her excitement when I went below; soon after my brother and Mr. Dalton left the house, then I went upstairs; heard the women laughing and saying

they did not know whether to poison themselves or not. The next morning I went to the house again; went into the front chamber where Mrs. Coburn and Mrs. Dalton were; they had sent notes to Porter and Sumner to tell them not to come to the house that day (16th). Porter came that morning but I did not witness the trouble. The day Mr. and Mrs. Dalton had the interview at my father's house I saw my brother John listening at the door. He asked me to stop and listen; I refused; their voices were sometimes loud and sometimes low.

John H. Coburn: Am a brother of Edward; am a mason, aged 24; have carried notes for Mrs. Dalton and Mrs. Coburn. Remember the interview at our house when Edward induced Mr. Dalton to call; when he came in he went down and brought Mrs. D. into the room. Dalton said: "Why, what have you done? I told you I could not see my wife." Edward said she wanted to have a talk and he had better sit down and have a talk with her; Nellie was crying and sobbing. She went to the window and said, "Frank, you wait, I want to have a talk with you and tell you all." I then left the room, pulled the door to, and stood on the outside to hear what they had to say; the door was not latched; curiosity induced me to listen; heard Frank say, "Nellie, you don't feel any worse than I do. I wish I could die." She said next, "Frank, I'll own everything." He asked her about the ride; she said she went to ride with Sumner and stopped at two hotels; that she

was not any worse than her sister, and Edward had forgiven her sister Fanny, and he ought to forgive her; at the Watertown Hotel she said Mr. Sumner wanted connection with her, and she did not let him; coming home they stopped at the Brighton Hotel; while there Sumner took her on the sofa and accomplished his purpose.

She said her sister had done something worse than that; she said the story about Sumner having tried to have connection with her in a saloon was not true. Nellie accused her sister with having connection with Dr. Blake, and also with Mr. Porter at a house in Middlesex street; that Mrs. Coburn had lost her handkerchief at this house and was afraid it would be found out, because it had her name on it. As to the abortion she said he should not blame her, for it was the wish of her father and mother; that it was at Dr. Calkins' in Pleasant street; she wanted Frank to forgive her and take her away to California or somewhere else and her father would give him the money to do so; that her mother went with her to Calkins and he said he could not perform the operation till the mother left the room; that it did not take him long to do it; think she said the child was born several days after; she said her father was out of town; said she had seen Fanny bow to Porter when he passed the house. I did not remain at the door the whole of the three or four hours they were in the room, but went down to tea.

When Mrs. Dalton came out

of the room her face was red from crying; I never told her I overheard the conversation, but have quoted sentences to her that I heard.

Cross-examined: Was about two hours at the door; was at a crack; did not try to peek in; had no idea I was doing anything dishonorable. Yes I sent that telegram that John Simpson was with me; it was false; suppose my object was to get money. May have told Mr. Gove that John Simpson would testify seeing Sumner and Mrs. D. commit adultery. I took a man to the Tremont House and had him register as John Simpson, New York; took another friend

to the Parker House and had him book in the same name and we sent a note in that name to Mr. Gove asking him to call. Mr. Gove hired me to go to New York to keep me out of the way; and he gave me money to keep Simpson away; never knew anyone by the name of John Simpson; a man in the court room told me that a person of that name saw the adultery.

Nancy Marston: Mrs. Joseph Coburn is my sister; remember the interview between Mr. and Mrs. Dalton; saw John Coburn listening in the entry, standing by the door of the room.

Gridley Coburn, (a brother) testified to the same effect.

MR. DURANT'S OPENING FOR THE DEFENSE.

Mr. Durant. Gentlemen: We have nothing to do now with anything but the rights and the wrongs of that young woman. I wish you now, gentlemen, to listen to the story of Helen M. Dalton's life. It is a very simple and a very brief story, until it arrives at that hour when a young woman's flattered vanity, in a moment of folly and indiscretion, led her to take a step which has become the great sorrow of her life—until it arrives at that darker hour, when the malignity of a man who should have been her brother, of a man who was her brother-in-law, poisoned the once affectionate heart of her husband, and has turned him away from his still tender and loving wife.

Helen Dalton was the youngest child of that aged couple who sit here by her side, her sole guardians and protectors, while the man who swore to love and cherish her through life, has taken this hostile position. She was born and has always lived in Boston. She was the youngest child of these parents, and her affectionate disposition made her the pet and idol of her home. Her simple round of pleasures and occupations, her school-mates, her father and mother, her brothers and sisters, were enough for her enjoyment and happiness. She had not gone into society at all; she was acquainted with but few persons, and it will be, gentlemen, one of the most striking and singular facts which will be laid before you in this case, that at the very time when her beauty first attracted Mr. Dalton's eyes, on her way to and from school, at that very time she had so little of woman's vanity or woman's love of admiration, so little desire for the society of the other sex, that for six months

after her beauty attracted him, he sought in vain for the opportunity of catching her eye in the street, for the purpose of attracting her notice and securing in some way a claim to an introduction. He mentioned it afterwards himself, as showing her innocence and purity, her comparative ignorance of men, and her little familiarity with the ways of the world. He sought her acquaintance; at last he was introduced to her, and they both became devotedly attached to each other. After a year and a little more, with the sanction of the parents on both sides, they were married. Looking back now, gentlemen, to that time, in the light of that experience which this sorrow has given them, both families undoubtedly, in their calmer moments, both Mr. Dalton and his wife, and their mutual friends and connections, may see in the circumstances of that marriage things which a more careful and thoughtful prudence might have checked, and so might have prevented those painful circumstances that have followed from them. It is a matter of regret, but by no means a matter of blame, that the parties were married so young. It would have been well for both parties had they been older, well for her if she had had more experience, if they had waited until she had more familiarity with the world, and was better fitted to assume the heavy duties and burdens of wife and mother. But that was not to be so. They were married, and instead of being taken to a home, to a modest, simple home, where the duties of housekeeping might have absorbed her thoughts, might have kept her out of the reach of admiration, she was taken to a boarding house—first boarding with her brother, Mr. Richardson, and then in a fashionable boarding house in Summer street. The counsel for the libellant has told you that in these early days of their marriage, Mr. Dalton was greatly absorbed in business, giving his whole time and thought to that.

Undoubtedly, he feels some regret, on looking back, that he did not give more time to his young wife, and less time to business; in that case, the consequences which have followed might have been avoided. I do not allude to this, gentlemen, as a matter of blame, at all; I am only alluding to these various circumstances which show how easy it was for a young girl, taken from school to be married, a young girl who had no knowledge of the ways of the world—a young girl wedded too soon to her first lover—a young girl who had received from no other than himself the admiration which her sex may claim as a right—a young girl who did not have the cares of housekeeping to absorb her thoughts—who did not have the society of her husband, except occasionally, who perhaps thought the adoration of the lover was too soon sunk in the colder regard of the husband, absorbed too much in his business,—I state these circumstances, gentlemen, only to show how easy it was for that young child to be misled for a few moments by the admiration and worship she excited, and by her flattered vanity when this young man, who has paid such a terrible price for his folly, first made her acquaintance, first admired her beauty. I repeat, that in no one

of these circumstances do I ask you to blame father or mother, or attach the slightest blame to her husband. I state them only in order that, in your knowledge of human nature, when you come to measure her rights and wrongs, you may measure her as she is, and deal justly by both.

Mrs. Dalton met William Sumner; the circumstances only need be alluded to. He was an acquaintance, I believe in some remote degree, a relative of Mr. Porter, who knew Mrs. Dalton's sister. He was introduced to Mrs. Dalton by Mr. Porter, he admired her, met her at saloons, sent her bouquets once or more, walked with her, rode with her, I believe also, gentlemen, it will be admitted—for we desire to conceal nothing—I believe he presented her with a volume of poems, by that amorous poet, Thomas Campbell; at least, Mr. Edward Coburn, with that very sanctimonious air which distinguishes him, says he found the book to be Campbell's productions. There was a good deal of levity, a good deal of what we call flirtation, folly, and then one blow was dealt, and endless sorrow.

Of Mr. Sumner, gentlemen, of his course in this matter, very little need be said. The history of his conduct has been before you. A youth not twenty years of age, attending school here in Boston—that he was guilty of folly, of wrong, may be well admitted, but for that folly and that wrong he has paid a price which will induce us all to be charitable to him for his sake and for the sake of his friends. There is a desolate home, gentlemen, out yonder among the blue hills of Milton, where a grey headed man is sitting by his desolate hearth, watching the cold grey ashes; the fire, the glow, the happiness of home, have gone. For his sake, nothing that is not necessary, nothing that is not in charity, should be spoken over William Sumner's grave.

If he has been guilty of crime, if that unfortunate young woman has been guilty of crime, if that is proved, the consequences will fall upon her; if it fell short of crime, if it were folly and wrong, over that folly, over that wrong, which did not come to crime, let the veil of death be thrown.

I was pained, gentlemen, very much pained, to hear the counsel for the libellant, in his earnestness, in his indiscretion, (if he will allow me to say so) make a statement with regard to that boy, which ought not to have been made. He said that the death-bed confession of William Sumner could not be admitted here. Gentlemen, one among the many singularly painful incidents of this trial, was this, that a gentleman well known in Boston and respected by all who know him, the brother of that boy, was called here as a witness. That gentleman was the witness of the death-bed scene of William Sumner, and watched him in his last moments. If that boy, passing down to his narrow grave, made any confession, it was made in the presence of that honorable and worthy man; and although by law that death-bed confession cannot be admitted, we here and now and always withdraw the obstacle, and the libellant, at any stage of the trial, may call that man upon the stand to tell

you what his brother said with sorrow and penitence in his last hours. So much for him; we have very little to do with him; we have more to do with others. For her, gentlemen, I have only this to say, if any one of you feels there was indiscretion, she feels it too; if any one feels she was false to her marriage vow when she allowed this young man to say to her that he loved her, when she allowed him to ride with her, to talk to her, and to flatter her, she feels it a hundred fold, and she has received a lesson which to her dying hour she will never, never forget. But I say for her, more strongly than for him, whose advocate I am not, be just, but be charitable. I say, gentlemen, as man to men, now that you have tempered the current of your blood, now that the sorrows and experiences of life have enabled you to walk more coldly and calmly and temperately through the world—if you can now say nightly, as you lay your heads upon your pillows, that you can accuse yourselves of no folly, of no indiscretion, that you are not human beings, but machines, that your conduct is ever guided by prudence, by the exact rules of right and wrong—if you can say this, then judge and condemn; if you can say nightly that you thank your Heavenly Father that you are without sin—if that prayer and thanksgiving of the Pharisee is yours, I have only to say, that her's is the prayer of the Publican: "God be merciful to me a sinner." She feels, she acknowledges, more keenly than any other human being can feel, and in stronger language than any one else can acknowledge, that she has gone astray, that she has done wrong. She is penitent, and she seeks to atone; and, gentlemen, if suffering can earn forgiveness in this world or the next, I beg to know if her sufferings have not earned for her forgiveness. After the dark tragedy which followed upon that folly, the exposure from that hour to this—the terrible exposure of this trial—if you can say that this young woman has not atoned sufficiently for that folly, then you pass a very different judgment upon her than that which was passed by the affectionate, just and generous heart of her husband. More than a year ago he knew all this, and more than a year ago he forgave it all.

That gentlemen, was the next step in the progress of that young wife's history. Carelessly left to herself in her lodgings, subject to the influence of that indiscretion that has covered like a cloud her whole existence, that same indiscretion hurried her husband to a course which cost him exposure and imprisonment, sorrow and suffering. Then Mr. Dalton knew his wife, knew her in many hours of penitence, knew her in that hour when he compelled her to go to her family and submit to the humiliation of acknowledging there the wrong she had done—then Mr. Dalton knew it all and forgave it all, and lived with her again. The publicity and exposure which followed upon the affair of the 17th November made it desirable that they should not go to live again at their old lodgings, but the house of Mr. Richardson, their brother-in-law, was open to them, and they lived with him until the hour when the death of that unfortunate young man caused the arrest of Mr. Dalton. The incidents of

those three weeks, so honorable to his heart, will necessarily come before you. Perhaps feeling that very regret to which I have alluded, that if he had been able to give more of his time to his young wife this would have been prevented. That if he had watched over her first steps when from a child she became at once a woman, from a school girl a wife, the disposer of her own time and the mistress of her own actions—perhaps he felt this result might have been avoided; but certainly those three weeks were weeks of the most unchanged and unchanging affection, and I believe if we could look into the hearts of those two young persons, we should find recorded there, that even in the early period of their marriage, there are no days to which they can look back, in their sorrow; which were days of such deep happiness as those which followed this exposure, when the husband and the wife came together, lived together again, and were reconciled.

Then Mr. Dalton was arrested and committed to jail, with Edward O. Coburn, on a charge of murder, and remained there about a month, when they were liberated on bail. During that imprisonment in jail, gentlemen, the same state of feeling existed between these young people that existed while they were living at the house of their brother. Mrs. Dalton was tender and affectionate toward him, he was loving and tender towards her. They corresponded quite frequently, and their letters have been preserved. Those letters it will be my duty to read to you to illustrate the dark conspiracy that was afterwards arranged by a man whom we know, and to show you how completely and fully Mr. Dalton had forgiven her. Those letters were written in the sincerity of that man's heart while he was in jail. They are full of expressions of affection, warm, sincere, tender, devoted affection. There are somethings in them, gentlemen, that under other circumstances might excite a smile, for few persons I suppose would like to have their confidential letters read by others than those to whom they were addressed, but I shall read them, and I trust they will be heard with no other sentiment than that of the warmest admiration toward the man who wrote them; that is my feeling at least.

It is not true that he discovered that his wife was unfaithful, or that she had been guilty of crime. No such thing was true. That was what I will call, for his wife's sake, one of his *errors*, not crimes, when he instructed his counsel to say so. Gentlemen, the last day, or the last but one, of his confinement, he wrote a letter to his wife, full of the warmest affection and the frankest confidence, looking forward to the Monday when he should be liberated, and telling her that he expected to meet her as soon as he should come out of jail. He did come out of jail, but they did not meet.

His wife went to his house according to appointment, but was rudely, cruelly driven from the door by his family. Gentlemen, from that time there has been a change in his conduct towards her which we can easily trace, and the motive for which we can prove, and you can understand. I do not think, I do not believe, that at

the hour when he left the jail, his feelings or his motives had changed. It will appear that he was instructed by his counsel as soon as he came into free communion with them, that it was absolutely necessary that he should not be seen living with his wife, or on intimate terms with her family; they thought such a course would be prejudicial to his case. Certainly we do not blame them for this. They acted in their discretion and advised their client to take the course they thought prudent and proper. And whether it was prudent and proper, or not, we have no fault to find with them. It will be proved that that was the reason why he separated from his wife at that time.

Then came the trial for manslaughter, and it will appear to you that in that trial necessarily there was a sharp contest, angry and excited feelings, and necessarily in some degree, for the justification of Mr. Dalton, he was obliged to appear in an attitude of hostility to his wife, to justify his assault upon that young man. Taking advantage of that, gentlemen—for there was always at his ears an evil spirit ready to suggest evil thoughts, and darken his mind—taking advantage of that, his mind was gradually poisoned against his wife and against his own peace. The trial was finished, he was acquitted of manslaughter, and then after that time, as he told Mrs. Dalton and her friends, he was blamed on account of the verdict, the public thought he ought to have been convicted of manslaughter, and he said his friends insisted that it was necessary for him to apply for a divorce. The trial was finished on the 2d February. Before he was sentenced, about the 10th or 12th February, the first intimation was had of a change in his feelings and intentions. There had been meetings in that same mysterious chamber, which has such a convenient door, and what took place there you can readily understand when you come to know the result. Then it was that, acting upon his wounded pride, upon his excited feelings, upon what he was told was his duty to the public, (as if the public had anything to do in the matter,) he was induced to instruct his counsel to give notice of a proceeding for divorce. Then it was that commenced that dark conspiracy against this young woman, against her family, against everybody that dared to defend her, which we shall expose, and which you can trace so plainly. A divorce was to be had; but for a divorce something more was needed than indiscretions, than simple love letters, than walks and rides; there must be proof, conclusive proof, of the darkest crime of which a woman can be guilty. Then commenced the conspiracy. We are unable, of course, gentlemen, to tear away the veil and bring out to full daylight those plots, those meetings, those arrangements, but we can see some dark shadows behind the veil, some faint footsteps in the sand; we can know little of the machinery, but when you come to put the various facts together, you can as easily track them out in their devious courses, as if you had seen the whole machinery and the whole plot going on. Gentlemen of the jury, you can watch yonder clock and see the minute hand

moving on its course; you cannot see the hidden machinery, and so, too, the machinery of this conspiracy is shut out from our view, yet we can track them in their devious windings until the conspiracy is consummated by such *respectable* and *credible* evidence as we have had before us.

On the 11th February, or probably some few days previous to that, Mr. Dalton and *somebody else* had made up their minds that this young girl was to be ruined for the sake of restoring Mr. Edward O. Coburn and others to their deservedly *high standing* in the public estimation. It was necessary that there should be proof of guilt as well as proof of flirtation, and the first plan laid was, that this scene should be laid in Fera's saloon, and that the proof should be that the crime had been committed there. That was their *first* plan, and if the case could have been tried at that time, it would have been no question about a crime committed in Brighton, but a question of crime committed in Fera's saloon. Immediately after the letter which I hold in my hand was written by Mrs. Dalton, he himself went to the store of a gentleman who I hope some of you may know, Mr. William Richardson, a gentleman who, whether you know him or not, will show his character upon the stand—a manly and honorable man—to converse upon the subject of a divorce. He was asked what he meant by talking about a divorce where there had been no guilt. "Oh," was his reply, "she has confessed her guilt to me," and this, gentlemen, again I say for the wife's sake, is one of the errors, not crimes, of that man. "She has confessed that she committed adultery." "Where was it?" "In Fera's saloon." "When did she tell you?" "At the time of the flogging affair." "Indeed! if she confessed her guilt, why were you living with her under my roof for three weeks afterwards," "Why, those three weeks were nothing." "But why did you tell me morning after morning as we walked down street together, that you believed she was innocent, and on one occasion that she was innocent as an angel?" "Why, it was a family matter, and I did not want to speak of it." "Why did you say it was Fera's saloon, where it is plainly ridiculous to suppose such an act could be committed!" "Well, she confessed that she committed it there!"

That night when Mr. Richardson went home, he thought so much of what had been said to him that he went to Mrs. Dalton and told her what her husband had said, and that very night the miscarriage occurred.

A day or two afterward Mr. Dalton called again at this gentleman's store, and was told that his wife protested that she had never told such a story, and was then pretty severely rebuked for making such an unreasonable and absurd statement. You see plainly, gentlemen, that the plot was to lay the scene of the guilt in Fera's saloon, and whether Mary Hunter, John Coburn, or some of Mr. John Coburn's friends who have no Christian names, were to be called to prove it or not, I do not know. But that was the crime, and that was the place.

They had taken a false step—but these conspirators, though very adroit, may be excused for bungling in their first attempt. Even our great American sculptor, Hiram Powers, who from his little hut in the backwoods, has made all Europe worship American genius, was a little rude in his first attempts with his chisel, his first productions were not by any means models, and these gentlemen when they hatched their plot did not choose a very good scene for the commission of the act of adultery. They had made a false step from which they saw they must recede. Have you forgotten, gentlemen, that in John Coburn's testimony, and in his statement which he wrote down to swear by, he is very careful to have that matter introduced, and to enable them to fall back from that step, Mrs. Dalton is made to say that it was true she had confessed she committed adultery in Fera's saloon, but that that statement was false, and she retracted it. They had made a blunder, and it met a prompt rebuke from that manly brother, when Mr. Dalton told him that absurd story.

One word more bearing upon another part of this testimony. If Mrs. Dalton ever had confessed the guilt of adultery in Fera's saloon before the 25th February, when John Coburn swears that she did confess it, it must have been when they were living together at Mr. Richardson's, after the flogging affair. Mr. Dalton said it was at the time of the flogging affair. They lived together at Mr. Richardson's until he was sent to jail, and while he was in jail he was not allowed to see his wife, except in the presence of an officer. He did not see her after the 25th February, and therefore Mr. Dalton is placed in this position. While he was living on the most affectionate terms with his wife, either he had heard the confession of adultery in Fera's saloon, or else he and his friends fabricated that story to enable them to carry out their foul purposes. There is no escape from that. I imagine, gentlemen, when you hear what Mr. Richardson will tell you with regard to that interview between himself and Mr. Dalton, you will come to the conclusion that there must have been a very interesting conversation about that time, between these people in that *mysterious upper chamber*. Whether Mary Hunter was called in to assist or not, I cannot say. They must have felt that that story would not do. Then appeared Mr. Simpson; the locality of the crime is changed, and Mr. Simpson is the man who is to testify to the commission of the crime. Whether there is such a man who breathes the upper air, or whether he is a mythical being, who can only appear in letters, we cannot say; but it will appear that there was a new plot concocted, and that John Simpson was to have something to do with that plot. But there was a double plot, a plot within a plot, for that sweet flower, John Coburn, was concerned in this matter, and it was not enough for John Coburn that John Simpson should be used to prove the crime of adultery, but there was a certain other purpose for which Mr. John Coburn would use him, for his own benefit. Mr. John Coburn is a mason, but that would not supply him with fifteen

dollars a night for his rides, his billiard playing, and his other pleasures, and so, as I said, there was a plot within a plot. Whether John was playing false to both parties, or to which of these he was playing false, may be hard to discover; but this Mr. Simpson was not only to prove adultery, but also to be the means of obtaining those necessary dollars which are so essential to young men about town to supply their very proper desires and amusements. The story is simply this: whether he was turning traitor to his brother or not, or whether he was partly true and partly false or whether he did not know whether he was true or false, he went to Mr. Gove, and told him there was a man named John Simpson, who was going to swear that he was at Brighton, and saw the act done. That is going a little too far, said he, "It is too bad. He lives in New York, and if I could go there, I could make it all right." Well, Mr. Gove believed it—because a young knave sometimes knows more than an old fool, and he made him a fool by that story—gave him money, and he started for Providence, taking with him somebody to write letters for him, because his hand-writing might expose him, (for John is a shrewd young man, you know.) He comes back, he sees Mr. Gove and tells him that he shall see Mr. Simpson; but pretty soon Mr. Gove thinks a little, turns matters over in his mind, and is satisfied that it is all a humbug, and will not give John any more money, and tells his mother about John—it is a singular weakness in him to suppose that his mother would have any influence over a young man of spirit like John. Mr. Gove goes and tells his mother, and then John goes to the Tremont House and the Parker House and writes letters in the name of John Simpson, to get Mr. Gove to come and see him. You have heard the story that he was hired to go to New York, because the trial was coming on. He has given the date, the 25th March. It will appear in evidence from the record that up to that day Mrs. Dalton had not appeared in court. The record will show that she was not allowed to appear until the 31st March,—that there could have been no court, and of course, that there could have been no assignment. You will judge whether or not, under such circumstances, Mr. John Coburn was hired to go away because the case had been *assigned*.

Well, gentlemen, the plot progresses somewhat. The matter of Simpson was not given up; I doubt, gentlemen, it is for you to judge, whether it was given up until sixty days ago. John Coburn was certainly often at the jail accompanied by a man whom he spoke of as Baker and as Simpson. Whether he had talked and thought about Simpson so long that he mis-called his friend's name or not, or whether he intended to have him personate Mr. Simpson or not, you must judge; we shall lay the fact before you. Matters progressed until the date of my first connection with this case, when Mr. John Coburn's deposition was taken, and then the interesting Mr. Coburn was examined at great length, this matter of Simpson came out, that part of the plot was exploded and they were

obliged to rely, not upon such evidence as that, but upon evidence within their own borders.

This evidence is from three parties—Edward O. Coburn, John Coburn, and Mary Hunter—by whom this charge of criminality is sought to be established. With regard to these witnesses, we have some evidence, and very decided evidence, to lay before you. I need not call your attention to the nature of the evidence, which consists of confessions pretended to have been made, always made under such circumstances that there was nobody else *except* the witness to hear them. We cannot produce anybody who was present when Mary Hunter received that astounding information from Mrs. Dalton about looking under a bed in a room where there *never was a bed*. So with Edward Coburn; he takes great pains to tell us that nobody was present beside himself when that pretended confession was made to him. So with regard to honest John—there was nobody to keep him company in his honorable action of listening at that door from four and a half o'clock until nine, as his aunt says he did.

I shall have the pleasure of laying before you two or three facts with regard to these witnesses which are pretty decisive. Some time within the last six months Mary Hunter was accidentally seen going into Mr. Dalton's store. This fact came to the knowledge of Mr. Richardson. That day or the next she called at Mr. Gove's house, and was talking with the family when Mr. Richardson came in. Mr. Richardson said to her, "I understand you have been to Mr. Dalton's store."—"Oh yes," said she, "I was passing by, and Mr. Dalton invited me in. He treated me very politely, dusted a chair for me, and I sat down." "Then," said Mr. Richardson, "I suppose he is going to summon you as a witness." "Oh no," was the reply, "I told him I did not know anything about the case, except that Mrs. Dalton went to ride with Mr. Sumner. I am willing to say that to you now." Mr. Richardson said he still believed she would be summoned as a witness. "Well," said she, "if he does call me as a witness, I shall tell something about him that will cover him with shame forever." That is the story Mary Hunter told six months ago. Her story has grown somewhat since then—since that story about the adultery at Fera's saloon, which they thought so conclusive, has turned out not to be so. Still more than that, we shall be able to show to you that even more recently, Mary Hunter speaking of the divorce case, said that she believed that the "creature" was innocent—speaking of Mrs. Dalton. Of course she could not have had any intimation then about her looking under the bed, for that would not look like innocence. So much for that impersonation of all that is lovely in womanhood—Mary Hunter.

I do not think it is necessary to take up much time in talking about John Coburn. He has gone to his grave, and has been followed by quite a crowd of witnesses *without Christian names!* Nobody will strew flowers daily on his grave, unless it be Mary Hunter. Of these witnesses enough. There is another part of

this case requiring more attention in my opening—a part of the case more extraordinary and more base than ever came before a court of justice. They have charged here upon Mrs. Dalton, and upon her father and mother, that Mrs. Dalton, having been guilty of adultery with William Sumner, to conceal the crime and its consequences, she, by the advice of those parents, committed the other highest crime—procured an abortion and murdered her child, that the proof of her guilt might be out of the way. That is the charge, gentlemen, made, urged, and attempted to be proved, with the most Satanic malignity that was ever known in a court of justice. Never before did you hear or know of a plot parallel to this, where the attempt was made not only to destroy a young woman, but in one grave to bury a whole family. And from whom does that charge emanate? Among all the incidents of this trial, painful, loathsome, shocking to human nature, there is nothing that parallels the scene which took place on that stand in your presence. That respected woman, Mrs. Dalton's mother, day after day, had sat by her daughter's side. On the stand stood her son, Edward Coburn—the man to whom years ago she gave her child to love and cherish—the man who made her by that tie his mother—that mother, one of the most inoffensive and mildest persons, as you will see at once when you see her upon the stand—the last person at whom such a malignant blow should have been aimed even by the hand of such a malignant man. He told his story. He charged this crime upon Mrs. Dalton, and connected her father and mother with it. Then he was cross-examined upon that subject. It was the most striking scene I ever witnessed in a court of justice. He was asked if it was true that that lady, his mother, had been guilty of that crime, and then, pausing an instant, like a serpent coiling his folds, came one deadly hiss—"Yes, it is true; she has done it six times before." Was there ever perjury which was not accompanied by folly? The very enormity of the statement carried its refutation with it. And then the fool, after cross-examination, comes back and says, "I did not mean six times exactly, there was only twice that I remember when the attempt was successful." The charge, gentlemen, against that lady is connected with Mrs. Dalton. We shall have Mrs. Gove and her family upon the stand, and you will judge whether it is true or not that this crime has been committed. I say, gentlemen, that it is not necessary to go into much evidence upon that point, except to illustrate the malice of this party, because day by day the case has been fading away, until now it is acknowledged, or rather proved, that child was Frank Dalton's, so that the motive for the crime which was said to have been to conceal the consequences of adultery with William Sumner, is taken away, and now it is alleged that the reason given by this father for violating his daughter's person, for taking away that young life as it lay under its mother's heart, was that Mr. Dalton might refuse to acknowledge the child, and thus bring it to shame.

We shall exhibit to the Court the fullest proof—proof which the

libellant cannot deny, for it is under his own hand—that long before this, Dalton knew of the pregnancy of his wife, knew it was his own child, acknowledged in his letters that it was his own child, and so what motive could there be, may it please your Honor, to conceal the fruits of crime when the husband acknowledged it was his own child? What motive for Mr. Gove to say that the child would be dishonored by his father's denial, when they had his own father's hand acknowledging the child? In his letters he was sometimes joking his wife about making baby clothes, sometimes guessing about the sex of the child, sometimes speaking of it as "our child." Gentlemen, the strangest thing of all in this charge is that the first hint on which these conspirators acted was contained in the letters of Mrs. Dalton to her husband, which they have not chosen to produce and lay before you. It happened in this way. I believe it was about the last of September or the 1st of October, Mrs. Dalton became pregnant. Mr. Dalton knew of it before he went to jail, and before the flogging affair. After he was arrested and taken to jail, Mrs. Dalton, as we can well understand, was much affected. She was sensitive, she devotedly loved her husband, and one of the saddest things in this case is, that at this hour, the Being who can read those two hearts knows that they tenderly love each other, and if they could be alone, away from the influences of family and friends, there would be no need of a separation, no need of a verdict of "not guilty" at your hands, to seal their re-union. Then, as might be expected, her agitation in the last of December brought on the pains which to her mother's experience although not to her, indicated danger of miscarriage. Her mother knew the symptoms, knew the danger; in the last of December, shortly after the arrest of Mr. Dalton, her mother, to relieve her danger, gave her what she had been accustomed to use herself—what is called a composition powder, and some foot baths—not a powder intended to produce abortion, or which could produce it, but a powder given, I suppose, to relax her system, and relieve her from the danger which threatened her. That was in December. The symptoms passed away, and she got well. Sometime between the 1st and 12th January, Mr. Dalton had said something to her which she thought unkind, something that he explained afterwards, that brought on agitation, and again she was attacked with those pains, and she wrote to her husband, telling him she had taken those powders; perhaps, in her inexperience, she may have called them preventive powders; perhaps, in her inexperience, she thought they were to prevent her from having a child. Three times she had those attacks before her miscarriage. Each time these remedies were given. At the time of the fourth attack similar remedies were given, and she had her feet in a foot-bath, when her brother, Mr. Richardson, came to the house to inquire about the story Mr. Dalton had told him. That night the miscarriage took place. The child was born in the usual natural way; and you will have the proof that this story of the abortion was not only ridiculous, but a foul fabrication. She never

saw Dr. Calkins; she never consulted Dr. Calkins; she never knew Dr. Calkins. No physician was called in at that time. You all know that this matter of miscarriage is a delicate thing which very many women are unwilling to talk about, and that very often physicians are not called in such cases. No physician was called in until it was found that her pregnancy was so far advanced that her breasts were full, and she suffered that most cruel torture that falls to the lot of woman, consequent upon broken breasts.

This is the whole of our story, gentlemen, and I believe you will appreciate the evidence we have to offer. But before I close I have Helen Dalton's own defense to make—her own answer to this charge. May it please your Honor, it is an answer which to my mind is worth, a thousand times, all that can be said or proved by counsel and witnesses.

You remember, gentlemen, that her brother, Edward Coburn, told us on the stand, that this letter, which I have in my hand, was sent by Helen Dalton to her husband while he was in jail. It was sent after the proceedings for a divorce had been commenced. And you remember that Edward Coburn swore that he read it to Frank Dalton, and that Frank said it was not Helen's composition. He never uttered that word! That it was said at that very time, I have no doubt; but it was said by Edward Coburn—Frank Dalton's heart would never have allowed him to say that word, if that letter was read to him. Not her own composition! Gentlemen, when you read this letter, as you will by and by, you will have no doubt in the matter. It is full of errors—errors of spelling, errors of punctuation, errors of grammar—but no errors of the heart. Not her own composition! Why, all the authors of America could not compose that letter! Bring me a poor, fluttering, wild bird, caught in his native woods, and his captive heart trembling as though it would burst through its sides, and then bring me the cunning artist who will make that heart, and teach it to flutter—bring me the man of immortal genius, who could write that letter, and I will give the starry crown to him. Not her own composition! Frank Dalton never uttered that word! If he had trusted his own heart, instead of trusting the dark serpent that had coiled around him until his better nature gave place to evil thoughts and evil passions, he would have felt his wife's little heart fluttering and palpitating there. It was written, gentlemen, partly on the day this libel—truly in his case called a "*libel*,"—had been served upon her, and partly the next day, when she was sick, when she was suffering from that keenest agony that woman can suffer. The opening is closed.

THE WITNESSES FOR THE LIBELEE.

April 21.

William H. Richardson: Am in the dry goods business; married a sister of Mrs. Dalton. Mr.

and Mrs. Dalton corresponded while in jail. On Jan. 5 he wrote that he did not think it well to see me until after the

trial; nor his wife either. After he came out of jail I talked to him; he said his counsel told him it would injure his case very much if he saw his wife or any of her friends; he accordingly kept away, but the trial was then over and he felt at liberty to see whom he pleased. I asked him what he thought the result would be and said his counsel had assured him the fine would not exceed ten dollars and costs. I asked him what his idea was with regard to living with his wife and he said he loved her and believed her innocent and thought he could live happily with her as he had and he would not ask to live happier than he had while he did live with her. He then went on to say that he thought the community would not be satisfied unless he procured a divorce; and furthermore he had given his brother power of attorney to act for him; that he was in their hands; they were decidedly bitter against his wife and he must pursue his divorce. I asked him how he expected to get a divorce if he believed her innocent. He then remarked that she had made a confession to him that she was guilty. I asked him when she made the confession and he said she made it at the time of the flogging and I asked him where she criminated herself and he said at Fera's saloon; I then asked him what he meant by saying in one breath that he believed her innocent and in the next that she had confessed her guilt; he made no explanation to that question, but simply said it was the case. I asked him

how she committed the crime, and he said that she and her sister went to Fera's saloon; that there they met Sumner, the three sat down to a table and rung for refreshments; while they were being prepared Mrs. Coburn went to the door and while she was there the criminal act was committed. I then asked him what he meant by stating, as he had done in passing to our places of business, that he believed his wife was innocent and in one instance that she was as innocent as an angel; and furthermore why he had lived with her three weeks if she had made this confession. He said as to living with her three weeks, that amounted to nothing; as to the other matter he said nothing about that. The reason he gave for stating that he believed her innocent was, that he wished to keep family matters to himself. I then told him that I thought it was ridiculous that he should come to my place of business and talk in that manner about his wife and spoke of the absurdity of his saying that she had committed adultery in so public a place as Fera's saloon; and he remarked that such was the case and then left my store, stating that he would see me some other day.

I saw Mr. Dalton in a day or two after and had some conversation with him. I told him I had been to see his wife and told her that he said she had confessed guilt and criminated herself at Fera's saloon; that she, after my saying what he said, protested her innocence and called upon her Maker to

witness she had never confessed anything of the kind and immediately burst into a flood of tears and appeared in great distress. He then made a remark that she had made a confession and hoped his Maker would strike him dead there in the store if she had not. I then told him that any man that would talk against his wife as he had done to me was a rascal and I had no disposition to keep up the acquaintance in future; and he bade me good-morning and left the store. I have not spoken to him since.

When we were walking down town during the three weeks he boarded with me, he used frequently to speak of this affair and never seemed to censure her much if at all. He threw the blame upon her sister Mrs. Coburn, and through her upon her husband. He said he was satisfied his wife would never have flirted had her husband treated her as he ought; he said that a man who would tyrannize over his wife and make her house a perfect hell, could not expect anything else but such treatment from her. He further stated that he thought his wife could not have thought much of Sumner from the fact that she left the letters she had received from Sumner where he could easily get hold of them, and that when he found these letters the seal of one had not been broken. He said that was plain to his mind and that he cared but little about it. At another time he spoke of her innocence and said that six months previous to his acquaintance with his wife he had frequently tried to

catch her eye in the street when she was passing to and from school and in no instance could he do it. He finally became acquainted with her; he frequently said he had no idea she was guilty with Sumner; he said he thought she was "innocent as an angel" one morning in walking from my house—he used that expression.

Have seen Mary Hunter at the Coburn's and the Gove's. At the latter place I asked her if she had seen Mr. Dalton that day and she said she had; she said she was passing through Congress street and he was standing upon the steps of his store; as she came up to him he extended his hand and appeared very glad to see her and asked her into his store. She said she declined at first and he then again asked her to go up and she went. She said he was very polite to her, offered her a chair and took out his handkerchief and dusted a chair and she then took a seat. I then asked if she was going to be a witness for Mr. Dalton and she said she guessed she was not, for she then told him she knew nothing against Nellie, excepting her going to ride, and she said, "I can now say I know nothing against her." I then told her I thought he would summon her. She said he knew better than that; if he should summon her she would say something against him that would shame him for his lifetime.

Cross-examined: Up to the time of his marriage Mr. Dalton and I were good friends; we used to confer together and talk over business and other matters.

I think he was a careful and promising young man; knew nothing of his being intemperate or given to vices of any kind. The Gove family seemed to think a good deal of him and spoke kindly of him. Saw but little of him after his marriage. He went to board in Summer street; he boarded with me but a few weeks; saw him occasionally, cannot say he was not attentive to his wife; the general feeling was that he was attentive and kind to his wife; he was sometimes away from his wife evenings; was not with him often myself. Think he was a very attentive husband to his wife.

It seemed to me he was not very independent—had the appearance of his being a slave to others, with no will of his own. In the same conversation he said his wife was innocent and at the same time that she had confessed that she was guilty of adultery; cannot swear that he used the word "adultery." Can swear that he used the word "criminate" or "adultery" when he spoke of Mrs. Coburn's going to the door; he said that then the "act" was committed or "adultery;" if he said "the act" I inferred that it was adultery; he did not say the door was closed; it did not occur to me that his wife had confessed to some improprieties. Thought it was an extraordinary story that anybody should say that adultery was committed under such circumstances. Thought it very foolish for a man to say so; did not occur to me that I could have been mistaken in the meaning of his language. Have

had but very little conversation in relation to this matter outside the family; in the family we have occasionally talked the matter over; there is no possibility of confounding a phrase used by one person at a certain time with a phrase used by another person at another time.

Have heard Mrs. Dalton say that she had taken an oath on this subject to satisfy her husband; she said that at his request she got upon her knees upon a Bible in her room in Summer street and there took a solemn oath that she was innocent. Also heard Mr. Dalton allude to this fact.

At the second interview I had with Mr. Dalton I called him a rascal. He did not knock me down on the spot—he is not the man who could do that thing; it may possibly be that he is a man who would not do it; we have not spoken since. He did not treat his wife badly at my house; I considered him a rascal on account of what he said about his wife—saying that his wife was innocent in one breath and in the next that she had confessed her guilt; do not know whether he put these contradictions together or not.

Mrs. Abby Richardson: Am a sister of Mrs. Dalton; she and her husband came to our house to live the day after the flogging affair and they remained until Mr. Dalton's arrest; up to this time his treatment of her was very affectionate. He did not see his wife, between the time he came out of jail and the day he went to Mr. Coburn's house, unless he may have met her on

the street; he insisted that she should not see her sister.

Cross-examined: He thought that Fannie was more to blame for the Sumner affair than Nellie. Remember walking in the street with Nellie one day when we met Sumner. He did not bow to her but turned around and looked at her and I asked Nellie who that gentleman was who looked at her and she said it was Mr. Sumner. I never made any such remark as that I wondered Frank's temper held out. I think my sister told me once that she had been to a fortune-teller. Nothing was done to my sister to produce abortion, nothing to my knowledge. If there had been I think I should have known it.

Mrs. Mary Gove: Mrs. Dalton is my youngest child. After Mr. Dalton was arrested she lived with Mr. Coburn; later she came to live with me. After his arrest she was troubled with maternal pains; these occurred about three times before her sickness and miscarriages; I had the charge of her at these times; I gave her some warm foot-baths and drinks; I had before used similar appliances in such cases. The first time the pains passed off. The second time I pursued the same course of treatment. She was sick a little longer the second time than the first. The third time I pursued the same treatment. Saturday night she took her usual warm bath. Monday night she was quite sick and she took a foot-bath. Mr. Richardson came in while she was bathing her feet. She was in more pain and more unwell

after Mr. Richardson came in. She appeared in great mental trouble and distress after he was there. She miscarried that night. The powders I gave her were Thomsonian composition powders. I have used them very frequently for colds. Mr. Richardson gave them to little Willie for a cold. It is not a medicine used to produce abortion. All this time Nellie was under my care entirely. Nothing was done to produce abortion—nothing of the kind. I never took her to Dr. Calkin's office in Pleasant street nor to any other doctor's office anywhere. In my knowledge or belief no operation was performed upon her. I never attempted to have or had an operation of that kind performed on any person.

Cross-examined: Never saw Dr. Calkins in my life; do not know where his office is; had thought a miscarriage probable for three weeks before; the medicine I sent Mary Hunter for was for myself; never sent her for savin; do not know what it is.

Dr. H. G. Clark: Heard Mrs. Gove's testimony; the foot-bath and composition tea could not have caused a miscarriage; miscarriage often occurs without the attendance of a physician; mental disturbance and anxiety often cause it. There is nothing in the circumstance detailed by Mrs. Gove inconsistent with a natural miscarriage; if pains came on at several times and then went away it was proof that the miscarriage was natural. The common way of procuring abortion is by puncture

with an instrument—others are delicate operations requiring skill.

Margaret Ware: Lived at Mrs. Coburn's when Mrs. Dalton miscarried; saw Mary Hunter last Fall; she said Mrs. Dalton was perfectly innocent of what was charged against her. Mrs. Dalton was sick about three times before the event occurred; the evening of the miscarriage she had ten foot-baths and a drink made of composition powder. I knew what it was because I always used it myself; that day she did not come to breakfast, dinner or supper. After nine o'clock, as I was going to bed, I went into her room; Mrs. Dalton was very sick; I stayed there till the child was born; Mrs. Gove took the child and carried it to her room. Never saw any savin; there was none prepared and given to Mrs. Dalton; I was cook and if any had been prepared in the kitchen I should have known it. Nothing was done to Mrs. Dalton to procure an abortion; they bathed her feet when she had the attack before and gave her composition tea; these attacks were before the miscarriage. The first I heard about the abortion was after this case came into court.

April 23.

Mrs. Mary Jane Emerson: Am the eldest daughter of Mrs. Gove; have miscarried twice on account of ill health but never did anything to induce it; my mother never ordered or desired such a thing. Never saw Dr. Calkins.

Cross-examined: Saw Mrs.

Dalton the Friday before her confinement. My mother and sister were in when I arrived—cannot swear that they remained—had a conversation there with regard to Nellie's condition; they were fearful of a miscarriage. Nothing was said about the remedies that might be taken to prevent the miscarriage, nor the means of procuring it—I am quite sure of it. I felt some alarm about her; did not suggest the calling of a physician, nor that one should not be called—my mother suggested nothing about a physician, either way. Think I heard mother say something about her Thomsonian powders; have known her to give them to Nellie before that time, but cannot tell when or where. Believe I remember of her giving those powders once since the 17th November. These medicines had been given her before and after marriage for colds.

Luther O. Emerson: Am husband of preceding witness. Live in Cambridge; am a music teacher; we have four children; there never was an attempt to produce an abortion on my wife by her mother's advice; it is a base lie.

William Matthews: Am a merchant here. E. O. and John Coburn were at my store a short time before the sentence for the Sumner affair. I asked if they felt satisfied of Mrs. Dalton's and Mrs. Coburn's innocence and they said they had perfect confidence that there had been no criminality. Mr. Coburn said he expected to live with his wife and he supposed or expected Mr. Dalton would live with his wife.

They called to get an explanation of something I had said with regard to the conduct of Mr. Coburn that I considered out of the way. I told him I had nothing against him. They said they regarded the matter as only a flirtation that might have gone further if it had not been stopped.

Mrs. Ellen Powers: Mary Hunter boarded with me; she spoke of Mrs. Dalton's having a miscarriage. Never said an abortion was procured. I said I wouldn't wonder if she would have a miscarriage by means of her troubles. She said she always considered Mrs. Dalton innocent of all that was laid to her charge in this case.

Cross-examined: I washed for Mrs. Dalton while she board-

ed in Summer street. My daughter carried one or two notes for her. Do not do washing for the Gove family. Do not know the family.

Perez Mason: Am city missionary. Last summer at the jail John called a young man with him there, "Baker" and "Simpson." He said the adjustment of the trouble about Mrs. Dalton was left to him and Mr. Gove. Said he knew nothing against her, but understood evidence would be produced.

George H. Drew: About the middle of January last met the parties here on the street; noticed they were conversing very pleasantly. Had known them both for some years. Had seen Mrs. Dalton often at the Richardson's.

Mr. Durant read a number of letters from Mr. Dalton to his wife. The first was written at the office of the chief of police at the time of Mr. Dalton's arrest and is without date; the last is dated January 15, 1856. These letters all commenced, "My own dear wife" and abound with expressions of tenderest affection, of regret at their separation and earnest longings for a re-union. In a letter dated December 10, Mr. Dalton says: "If the world could understand your case as I do I should feel happy, but as they cannot we must make the best of it." In a letter of December 21 Mr. Dalton intimates his knowledge that his wife is as "women wish to be who love their lord" and says, "I believe you told me you expected to have a good deal of sewing to do; you can get patterns from Fanny." December 22 he declares that nothing shall influence his conduct towards her. "My mind is made up and you are aware how I feel towards you and no matter how we are situated I shall always love you." The first letter was dated January 5 and marked: "Private—for my wife only."

Mr. Dana appealed to the counsel if a letter marked thus ought to be read.

Mr. Durant said he should leave that matter to the libelant and if he objected they should consider what course should be pursued in regard to it. *Mr. Dana* said, after consulting with his client, that he declined to interfere.

The letter was then read. It commences, "My sweet, dear little wife" and expresses a good deal of anxiety about her health and

alludes hopefully to their future life. Among other things he says: "You ask me to write to father, but I cannot while I am here. I will explain to you why not hereafter."

The last letter dated January 15 is tender and affectionate in its tone and the writer alludes to the joyful anticipation of meeting his wife the next day when he expected to be released from confinement.

Mr. Durant then read the letter of *Mrs. Dalton* to her husband written the day after the notice of the divorce action was served on her.

LETTER FROM MRS. DALTON TO HER HUSBAND.

My dear husband—I thought I would take this opportunity to write you, knowing your position, and thinking that you could not very well refuse to read it as it is the last letter I shall ever write you. Frank, this morning I received a document signed by you accusing me of a crime of which I am not guilty. Frank, you cannot tell what my feelings were while reading it; you had dealt blow upon blow until the last one is now dealt and by him who once professed to love me. Well Frank, what must be your feelings now? Have you no conscience? After telling me two weeks ago last Monday night, that come what could, you would live with me, and that your divorce case should be given up, and that you would send your lawyer, *Mr. Dana*, up that week to see me—the very next morning did you not tell *Edward* you would never see me again? How have you kept those promises? You have broken every one which you did most solemnly promise to keep; but now I do certainly think you had no intention of keeping those promises when you made them. Frank, had I treated you in such a manner you would have spurned me from you. It seems as if you had done enough to try to ruin my character. Was it not enough to talk about me as you did before your sentence without having letters (which you knew were none of mine) read in court as you did? And what have you done it for? Was it not to try and see if you could not ruin me still further and in a great degree build your own character up? What an unfair way for a husband to ruin his wife to build his own character up. The day may come, Frank, when you will be sorry you treated *Nellie* so, when in after years she may have shown to the world that she was not as bad a person as her husband tried to make her out to be, and wished to be forgiven as I have wished you to forgive me. Frank, we are now separated and never more shall we meet, but notwithstanding you have thus treated me I shall always love you. You recollect I was young when I first went astray and you might have lived with me again and I would have tried hard to make you happy. But perhaps God has so ordered it and all for the best, for I do not know as we could ever have been happy together after treating me in the manner you

have treated me. You have not only tried to ruin me, but have told such stories without the slightest foundation for them.

But I will not write so, for well I know, you are suffering as well as myself. Would I could do anything to contribute to your happiness, but I cannot. I hope, dear husband, you will make yourself as happy as circumstances will permit you. I am very glad to hear that you are treated so kindly, for you deserve to be treated well. I know you are suffering; how I wish that I could visit you and have one more sweet kiss from Frank's lips, but I suppose that I cannot even visit you nor even write to you again. Would I could write you often, but even that privilege I cannot even have. My heart is almost broken now; I long to lie down and die; would it not be happiness for you? It certainly would for me. How are you feeling, Frank? Are you happy? Are you well? I am not happy—far from it. I suppose I should be happier if I were well, but my breast is very painful, I cannot sleep with it, but sit up almost all the night. But I expect it will break soon and then it will get well. Oh, Frank, how I have wished you were with me since my breast has become so painful. Nights when I lie awake I think, if Frank were only with me I know it would not be as painful. Dear mother has been very kind to me; she sits up nearly all night with me. I seem to suffer more nights than day-times, for I sit up nearly all day. It seems as if my cup of sorrow was full, almost to overflowing. Last night in my anguish I laid and thought—Can it be Frank that charges Nellie with that crime and making it as public as he has? But it was true it was done.

Frank, when you left me could you not have said, Nellie is my wife; I have loved her, and as I have, I will not try to ruin her, but leave her as she is? But instead of that you have done all you could to degrade me; but no matter now; I will not blame you, you are my husband for the present. I will not talk against you, nor say ought that shall make you unhappy.

Wishing you much happiness and peace, with much love, if you accept it, I remain your True Wife.

Frank, should it be your pleasure I will be so happy to receive any note or letter which you may write me. Nellie.

April 24.

John Gove: Am a merchant here; have 7 children; Mrs. Dalton is my youngest daughter. Was west at the time of the flogging; when I got back Mrs. Dalton and her husband were at Mr. Richardson's; when I called there I found Nellie sitting in Frank's lap. On returning one day from a visit to the jail I

found Nellie very excited and I went to see Mr. Dalton about it, who seemed much concerned and said, "Tell my folks to treat her well." Never employed any doctor by the name of Calkins in my life and I tell this court and jury that all the stories relating to an improper and unlawful operation are entirely false in every respect; no such

thing was ever known in my family and the statement is the result of conspiracy; never heard of the charge till February last when I received anonymous letters on the subject. Saw Mr. Dalton a few days after his release from jail and talked with him about his treatment of Nellie; he said at one time he had intended to go back to her but his family had dissuaded him from it; he said that after he received his sentence everything would be right. I told him I had a notice of his intended action for divorce and after some conversation he said he would see Mr. Dana and have the action stopped. I told him that he could have no proof of any guilt on the part of his wife; he seemed to agree with me in this opinion, but said his folks thought he had proof enough. I then told him my strong conviction of her innocence, speaking of her youth and inexperience and finally he said that the divorce suit should be stopped, but as to living with his wife he could not until the opposition of his family was somewhat removed, which in time it would be. Know John H. Coburn; he had an interview with me at my house in which he said he had ill feelings against Nellie but now felt differently; he then said that there was a man named John Simpson who was to falsely swear that he saw the act of criminality committed at the hotel in Brighton and that this being too bad he would go on to New York where Simpson was and stop him. He wanted me to give him money to go and see if he

could find him. I told him to come to the store and I would see about it. He came to the store and after more talk I gave him \$27 to go on to New York and see this man; after his return I gave him \$17.

Several days after this Coburn came to my house and said he heard Helen's confession while in the room with Frank and wanted money to go away so as not to be here to testify. I did not believe the story and sent him away. On another occasion he came to my house and in an insulting manner told me that he had that in his pocket which would ruin me and my family.

Cross-examined: Was more than once told by one of the Dalton family that they had a strong case against my daughter. Know Dr. Lincoln; called on him last winter and asked him what he knew about the case; he said something about the time a certain recipe was sent to my house. We spoke of the trial and he said he was friendly to me and our side but did not want to testify. I asked him to see Mr. Durant; I believe he did so. The question whether the medicine was furnished in February or in the Autumn before might have come up; presume it did. His clerk thought the medicine was furnished in the Fall. Now remember Mr. Lincoln expressed belief that it was got in November or December. I told him not to talk to the young man about the matter as the latter was right as to time. Said nothing about paying him. Saw the young man afterwards in the shop; he spoke to me of the importance of his

testimony. I told Mr. Lincoln that he was careful to tell his clerk not to tell anything, but that he himself had told Dalton's people all he knew. At this Mr. Lincoln grew excited and I got somewhat angry and left.

Eldridge Thompson: Am clerk at Burlingame's Hotel at Brighton; the room described as the one occupied by Sumner and Mrs. Dalton never had a bed in it.

Dr. C. W. Calkins: I never saw Mrs. Dalton in my office and never rendered her any professional service or aid whatever.

Cross-examined: Was once, but am not now, a member of the medical profession. Refuse to say whether the advertisement shown me is mine; also refuse to say whether or not I have ever performed an illegal medical operation.

IN REBUTTAL.

April 25.

Rev. Asa Dalton: Am an Episcopal clergyman at Newport, R. I., and a brother of

Frank Dalton. Visited my mother's family in Boston on Thanksgiving day.

Mr. Dana: Did you have any conversation with the family about this affair?

Mr. Durant: We object.

Mr. Dana: We desire to show that this matter was scrupulously avoided, was never alluded to, but that Mrs. Dalton was always treated with kindness and consideration, though the family felt how much her conduct had affected the happiness of the son and brother. It has been asserted that the family of the Daltons had instigated Mr. Dalton to commit one of the basest of crimes in order to gratify their malignity or prejudice and they are entitled to show that from the 17th November up to the last interview they had treated her with great kindness instead of driving her rudely and cruelly, as it has been asserted, from their door.

Mr. Durant said he objected to the testimony on the ground: first, that the treatment of the Dalton family towards the respondent was already in evidence on the testimony of William and Abby Dalton, and secondly that the question was not whether he believed his wife innocent or not, whether he had acted foolishly or wisely, whether he had been induced by others into a belief of his wife's guilt, or whether he had been influenced to make this charge against his wife not believing her guilty or believing her innocent—but the question was—has Helen Dalton committed adultery or not?

THE COURT: I am of opinion that the testimony is inadmissible.

Anson N. Lincoln: Am an apothecary in this city. Mr. Gove came to my house and said

he wanted to know when some medicine was purchased; I said it was after the flogging affair.

He said my young man thought it was in the Fall. He begged me if I was asked by any one to say it was in the Fall and wanted me to see Mr. Durant. When he left he patted me on the shoulder and said, "Young man, you do the right thing by me and I will reward you handsomely." A few days ago he came with a friend to whom he said that I had told Mr. Dalton it was bought after the flogging affair. I said Mr. Dalton had never tried to bribe me, upon which he called me a liar and a scamp.

Cross-examined: The Coburn family are customers of mine. He offered me no particular amount of money; he did not ask me to testify in court.

Thomas W. Silloway: Am an architect. Mr. Gove said to me one day that as I was a friend of Frank's he wanted to disabuse my mind. Told me I thought it would be better for all concerned to have the matter settled amicably, for Mr. Dalton was determined to defend himself and would bring in the whole of this abortion affair without qualification. Mr. Gove

said he was aware of the fact, but inasmuch as Mr. Dalton was as guilty of adultery as his daughter was, he should not run the risk of anything of the kind ever being brought out; he said he was determined Mr. Dalton should live with his wife. The subject of abortion was introduced frequently during our conversation; he said he had done everything reasonable he could to induce Mr. Dalton to go back to his daughter. I said I thought it was rash to allow any of these things to come out in the way they would. Said he should press it to trial and use the evidence he had got, so as to get a divorce for his daughter, so that she might be married again. I did not think how it was he was going to manage the case so as to get a divorce for his daughter. I took it for granted what he said was correct. He did not mention who his son-in-law would be. I presume I said that some things would come out he did not dream of, if the case was pressed to a trial or something to that effect. I had reference mainly to the abortion affair.

May 4.

Mr. Dana read the following letters from Mrs. Dalton to her husband. The first expressed the warmest and most devoted attachment to Mr. Dalton and a willingness to sacrifice everything if she could only feel that her own Frank yet loved her. She wants his folks to let him alone and then he will act for himself; calls Heaven to witness that she never told Mr. Sumner that she loved him, much less that she loved him better than she did her husband; protests that she loves her husband dearly and if he could read her heart he would see there penitence, humbleness and a deeper love for him than ever and entreats him to say that he will live with her again. She says she took a little medicine but it did not affect her and she guesses that by and by she will have a little darling to love its papa so dearly; asks whether it shall

be a boy or girl, and expresses a preference on her own part for a girl, while admitting that she supposes her husband would prefer to have a boy. Says "I have been naughty once, but only once."

The second letter commences: "My own sweet Frank. I have just received your letter—how happy I am to receive it. It made my heart leap so to read it. Darling, you have removed a great load from my heart. I can now think that in a very short time I can live with you and call you my own, all mine with no one to tear you away from me." Further on: "Frank, notwithstanding I have done as I have, God knows that I love you with a love that knows no bound. Frank, I will forgive and try to love your folks, for I know that if I am real good and try to make Frank happy they will love me, won't they? I have been crying darling and I know that I ought not to expect anyone to love me, I have been so naughty; but I know that Frank will love me, if no one else will, won't you darling? You ask me what I took. I took a little powder. It did not hurt me at all, nor did it prevent my having one. I think after all I have done I shall yet be sick. May God's blessing rest upon you is the earnest prayer of darling Nellie."

My Darling Frank:—Another Sabbath has passed away and yet my sweet one is not with me. I hope only one more will pass before you will be with me, your own Nellie. My darling, you wished me to tell you what physician ordered me to take that powder. It was no one; I took it myself, without anyone's directions; it did me no good, for I expect to have my little one as much as ever I did. Dear Frank, I do love you. You are so good no one could help loving you, you are so sweet, so beautiful. Oh, how I wish I could blot out my past sins, but a wiser hand than ours may have directed all this for our good and I will be a darling wife to you if I live with you again; you do think I will, don't you? Please answer and tell me darling, tell me if you will forgive me; you have not told me that I believe, darling. Frank, little sweetie, I did not like it very well because you asked Edward what you did. You know, my darling, I think my letters as private as yours, and I wish you would be as particular as you would like to have me, about showing them or letting the contents be seen by anyone. You don't read my letters to Edward, do you darling? Frank, you know you wanted me to tell you all, and I shall and if it displeases you, you must tell me, won't you dearest? Fannie wanted to go to Prof. Lester's in Lowell street the other day to have her fortune told. She wanted to know if she should live with him again, and she wanted me to go with her and so I went. I did not have mine told. We went in a carriage and mother knew we were going. Was that wrong darling, or are you displeased with me because I went? I felt sorry when I got back and I shall never go again, darling, I promise you that. Frank do you think they will bring an indictment against you for murder

or for manslaughter—tell me dearest, tell your own Nellie what you think. Excuse me little angel if I ask you, won't you darling little sweetie. Frank I long to have you with me for I shall be so happy then dearest. And I have so many to talk to me now it vexes me very much indeed but when I get with you once more I shall be happy dearest. Then, little dear, sweetie, I mean to be a Christian. Now dearest I have led such a wicked life I mean to try and be happy. Now darling Frank when you come back or at least when you get out of that horrid place I have got many things of interest to tell you. I cannot write more now for my head aches so. I have been crying nearly all day, today, dear little Frank. Father went down to see your brother, Mr. W. Dalton and had a long talk with him; he said he had read your letters from father and he said that he thought that father tried to make you say what you ought not to while you was shut up there; he told him he did not wish any such thing. Father feels very bad to think that you will not write to him, even if it is not an answer to his letter. I hope darling I shall see you Tuesday looking finely. It will please me very much indeed. Oh, how I long for Tuesday to come, I shall be so happy to see you. How cold it is today and how dark the snow is here.

Today I have thought of you, how lonely you must be all day today. Goodby, my little darling baby. Many hugs and sweet kisses from Nellie to her darling angel Frank. Please answer.

My much beloved husband:

Feb. 28, 1856.

In our meeting yesterday I see a bright hope and prospects of a happy future before me. Oh, dear Frank, I hope that the day will come when we shall be happy soon. I feel much happier than I did yesterday. I feel now as if I had a dear husband to live for; before I felt as if I did not care to live; I had nothing to live for. But oh, what a beautiful thought now fills my heart—that I have him, dear Frank to live for; him to build all my future hopes on; his strong arm to learn on; his dear words and sweet smiles to encourage me; and if I should ever falter I have Frank to say, cheer up, Nellie, we shall soon be happy. It seems as if I could not express on paper my thoughts; but I long to fly to his arms and lay my face close to his and then tell him all my heart. Frank I have done wrong, very wrong. Young as I was I was led astray. I was tempted and in a moment yielded to the tempter. Oh, when I think of this it seems as if I must tear myself to pieces; but he, the tempter, is laid low in the grave. Would to God he had laid there long before he did lie there. Will you now take the erring one back to your heart again and say, come child, your husband forgives you as he would wish to be forgiven. Go and sin no more. If I could know my husband forgives me and would take me back and away from Boston I would ask no more. I would share hunger, poverty, suffering with you, and I would love you so dearly and make you so happy. I know I can make

dear Frank happy; for oh, I would try so hard to make him so. Frank, place yourself in my situation and consider all circumstances and wretched as I am, say, would you not wish to be forgiven? Oh, I cannot realize my situation when I want to be forgiven by Frank. Say, is it not almost cruel after all I have suffered and was willing to suffer for a time? Say, will you not, can you not forgive me and love me and live with Nellie again? Do not say you cannot, nay, will not love me and leave me in wretchedness to struggle with this hard, cold world with no husband to tell my troubles to. But still dear one should you pronounce that awful word I must like a woman, bear up as best I can. Frank, I am woman and long have I suffered. Say that I shall still be a woman in every sense of the word. And oh, do not, I implore you, cast me from you in this, my misery. But last night you talked so kindly to me, and now there is a bright thought springing up in my heart, and long may it last. It seems a long time since I saw you, although it was only last night; but soon I hope to see you. I have Abbie, dear Abbie today. She sends her kindest regards to you and also William; and [Abbie says she has an engagement for Friday evening and she says that if it is convenient for you to call Thursday she would like it, but if you have any engagement she will try to defer her engagement till another time. Will you please to send word by Edward tonight if it would be convenient for you to call Thursday evening? Be sure and come Friday; but be sure and send word by Edward if you please, darling].⁶ Frank, you please excuse this writing as I am not well today. I have taken a little cold, it has settled in my limbs. How I wish I could be enfolded in your arms tonight. God bless you tonight dear one, and may you be happy. Hoping to see you Thursday I remain, your own dear wife,

NELLIE.

Mrs. Joseph W. Coburn: Getting a telegraphic despatch from my son that he was away on business for Mr. Gove, I sent for and asked him what the business was John had been absent for. He said John felt friendly towards Mr. Dalton and he had heard the conversation between Mr. and Mrs. Dalton and he thought it was better that John should go away, as he was willing to go away, as it might bring Mrs. Coburn into the affair.

I told Mr. Gove that I knew all about the birth of the child but I did not feel at liberty to explain it at the time. Did not tell him from whom I heard it. He said he was away when that took place. I told him I supposed he remembered the conversation that took place about his daughter and asked him if he did not say he would rather have her life taken than have a child born under such circumstances—it would be an object of disgrace. I asked him if he

⁶ The passage enclosed in brackets is the one erased.

did not leave \$25 to pay Dr. Calkins for his attendance and he did not say whether he did or not. Nothing more was said about the abortion. I know nothing about the abortion of my own knowledge.

Mr. Gove went into the entry and talked to John and came back and said, "Your son says he will give me a threshing if I don't mind what I tell you." I said I thought it very wrong for John to use such language. He said John had been intoxicated in Roxbury; I replied that I did not know about that; there were a great many reports about and some about himself—that he always took his bottle of brandy in his valise when he went on his journeys, though he was a strong advocate of temperance.

Cross-examined: Can't say that I have any particular enmity towards Mr. Gove and his family; my feelings might have been very warm and friendly once on account of our connection; cannot say they are so now. We have visited perhaps once in six months, going back three years. They are not a family that I could have been intimate with.

Mr. Dana read a deposition of Mrs. Francis O. Coburn. She deposes that while her husband was in jail her sister took some composition powders to relieve her suffering; and relates the circumstances of the miscarriage as stated by Mrs. Gove. She knows Dr. Calkins by sight but has never been to his office nor to the office of any physician since 17th November, except to Dr. Storer; never knew or heard

that her sister, Mrs. Emerson or Mrs. Dalton took means to procure a miscarriage; does not remember that she ever told anyone so. The composition could not have been used to procure abortion; does not know what her sister could have meant by saying in her letter that she had taken powders for that purpose.

She saw Nellie snatch the letters she had written to Sumner from his hand while they were in a hack on their way from Brighton to Cambridge; tear them up and throw them out of the window. She knew that Sumner exchanged rings with her, visited her at her boarding-house and at her house and also that she went to ride with him alone to Brighton and that they stopped at a hotel. Mr. Richardson told Mrs. Dalton that Frank had said that she had confessed she was guilty of adultery with Sumner and that the act was committed in Fera's saloon. Nellie denied that she had ever made such a confession, burst into tears and was very much agitated.

In answer to cross-interrogations, witness deposes that she was summoned as a witness for Mr. Dalton and was in court every day for a week after the opening of the case. She knew of her sister's pregnancy in the month of September, 1855, and that she did not become acquainted with Mr. Sumner until the next month. The interviews between her sister and Mr. Sumner at Fera's saloon had been greatly exaggerated and could not have exceeded a dozen at most. She never saw any im-

proper freedom or indelicacy between the parties; Mr. Sumner always behaved like a perfect gentleman. Nellie told her that Mr. Sumner at the hôtel offered insulting proposals to her which she resented and insisted upon being immediately carried home and that he then drove home, only stopping at Brighton long enough to water the horse; that when they got home Mr. Sumner wanted to make an engagement to meet her the next day at Fera's saloon so that he might explain things in the presence of Fannie, saying she would feel better about it for he did not intend to offend her, but he did not know what kind of a woman she was; now he thought he knew. She also deposes that she never saw anything to indicate any affection on the part of Mrs. Dalton for Sumner; she used to talk over what he said to her and always said she only liked his acquaintance; was always very much attached and devoted to her husband.

Witness gives an account of the interview which Mrs. Dalton had with her husband when she (the witness) was upstairs with Mr. Dalton and testifies that

Mrs. Dalton did not use any profane language on that occasion or call to her not to tell Frank anything, as she had not told anything.

Samuel A. Wall: Was in Mr. Lincoln's store two weeks ago with Mr. Gove. Mr. Gove said to him that he had talked over the subject with Mr. Dalton and others. Mr. Lincoln seemed to be very much offended; he said, "Mr. Dalton did not do as you did, come over to my house and endeavor to bribe." Mr. Gove replied, "You shameful scoundrel, do you mean to say before a witness that I endeavored to bribe you?" Mr. Gove raised his cane at the time and was very much excited. Mr. Lincoln replied, saying that he might have misunderstood his meaning. I asked him if Mr. Gove had given him any money and he said he had not, but that when he left his house he patted him on the shoulder and said he would be rewarded for his kindness. I told him that that did not look like bribery; and he said that he told Mr. Dana the day before that his testimony would not amount to anything.

MR. CHOATE FOR THE LIBELEER.

May 5.

Mr. Choate. Mr. Foreman and Gentlemen: I congratulate you on approaching at last the close of this case so severe and painful to all of us. One effort more of your indulgence I have to ask and then we shall retire from your presence, satisfied and grateful that everything which candor and patience and intelligence can do for these afflicted suitors has been done. It very rarely indeed happens, gentlemen, in the trial of a civil controversy, that both the parties

have an equal, or rather, a vast interest, that one of them—in this case the defendant—should be clearly proved to be entitled to your verdict. Unusual as it is, in the view I take of this case, such an one is now on trial. To both of these parties it is of supreme importance, in the view I take of it, that you should find this young wife, erring, indiscreet, forgetful of herself, if it be so, but innocent of the last and greatest crime of a married woman,—I say to both parties it is important. I cannot deny of course, gentlemen, that her interest in such a result is perhaps the greatest of the two. For her, indeed, it is not at all too much to say that everything is staked upon the result. I cannot of course hope, I cannot say that any verdict which you can render in this case can give her back again the happy and sunny life which seemed opening upon her two years ago; I cannot say it because I do not think that any verdict you can render will ever enable her to recall those weeks of folly and frivolity and vanity without a blush, without a tear—I cannot desire that it should be so. But, gentlemen, whether these grave and impressive proceedings shall terminate by sending this young wife from your presence with the scarlet letter upon her brow—whether in this, her morning of life, her name shall thus be publicly stricken from the roll of virtuous women, her whole future darkened by dishonor and waylaid by temptation, her companions driven from her side, herself cast out, it may be, upon common society, the sport of libertines, unassisted by public opinion, or sympathy or self-respect—this certainly rests with you. For her therefore, I am surely warranted in saying that more than her life is here at stake. “Whatsoever things are honest, whatsoever things are lovely, whatsoever things are pure, whatsoever things are of good report, if there be any virtue, if there be any praise,” all the chances are left to her in life, for winning and holding these holy, beautiful and needful things, rests with you.

I cannot, therefore, with my impression of the importance of this inquiry, turn away from her, even to these parents

whose hearts are bleeding also. But is there not another person, gentlemen, interested in these proceedings, with an equal, or at least a supreme interest with the respondent, that you shall be able by your verdict to say that Helen Dalton is not guilty of the crime of adultery, and is not that person her husband? I do not say, gentlemen, that he ought to feel or would feel grateful for a verdict that should acquit her on any ground of doubt or technicality, leaving everybody to suspect her guilty; I do not say that he would feel contented with such a verdict as that, though I say it would be her sacred right that such a verdict should be rendered, if your minds were left in that state. He must acquiesce, whether the verdict is satisfactory to him in that particular or not. But, gentlemen, if you can here and now, on this evidence, acquit your consciences and render a verdict that shall assure this husband that a jury of Suffolk men of honor and spirit, some of them his personal friends, believe that he has been the victim of a cruel and groundless jealousy; that they believe that he has been led by that scandal that circulates about him, and has influenced him everywhere; that he has been made to misconceive the nature and over-estimate the extent of the injury his wife has done him; if he could be made to believe and see, as I believe you see and believe, and every other human being sees and believes, that this story of abortion, by which he has been induced to institute these proceedings, is falser than the coinage of hell; if you can thus enable him to see that, without dishonor, he may again take her to his bosom, let me ask you if any other human being can do another so great a kindness as this? If by your verdict you can assure him that his first thoughts on this subject were right; that the steadiness and constancy with which he held her to his heart, from the 17th November down to the morning of the 26th February; the steadiness and constancy with which he held her in his affections, after he became aware of every credible fact and circumstance that has been put in evidence in this case; if you can teach him that this steadiness and

constancy were just and honorable and true; if you thus restore him to his former and better self, before he was maddened by these falsehoods and this malignant conspiracy by which he has been surrounded: will it not be he, rather than she, that will have occasion to bless you for your judgment?

Sensitiveness to public opinion, if I understand the character of Dalton at all, is what has misled him; it is other men's judgments, not his own, which have led him to this proceeding; it is through others' eyes, not his own, that he has looked; and now I submit that, if you can only assist him to follow in the impulses of his own heart without dishonor, permit me to say, you may live long and do much, but to no human being can you do such a kindness as this.

"Not poppy, nor mandragora,
Nor all the drowsy syrups of this world,
Can ever med'cine thee to that sweet sleep
That thou ow'd'st yesterday."

It seems to me, therefore, gentlemen, if my learned friend on the other side will not deem it arrogance in me to say so, that I am here to maintain the cause, not of the wife against the husband, but of both of them. I am here to say, that the husband has a right to his wife, and the wife has a right to her husband. What is their case, gentlemen, as it now rests, in my own mind at least, and I trust in yours, as far as the result is affected by the whole evidence now before us? Permit me to state that case exactly as I apprehend it; and when I have done, that I shall be obliged to turn a little more particularly and more methodically to what the libellant has to prove, and by what evidence he has attempted to establish it; but first let me give you the position of the case as at last it rests, I hope, upon your minds, certainly rests upon my own.

These parties were married in June, 1855; he was very young, I believe not more than 22 or 23 at the time, and she was only a child, not yet eighteen, at school as late as the January previous, which she left in consequence of her

engagement, and to make preparations for her marriage. She was comely, of remarkable modesty—on the testimony of Dalton himself and of Mr. Richardson—affectionate and fond in her nature and disposition, a little quick sometimes, as has been testified to, but instantly herself again, and instantly hastening whenever a momentary difference had occurred between herself and her husband, to make all up by throwing her arms around his neck—herself making the approach to a reconciliation. She was the child, I hope I may be allowed to say, notwithstanding the testimony of Mrs. Joseph Coburn given here yesterday, of respectable, Christian parents, somewhat beyond the middle of life, their youngest and not their least beloved, and they had been diligent to afford her all those opportunities of education, moral and mental, which our commonwealth offers to all its daughters, and they had afforded her, what perhaps is of more importance to remember here, the still more inestimable privileges and blessings of the family altar and worship, and a Christian, constant parental example. This was Helen Dalton that day—pure as the falling flake of snow, pure as any child, as any bride that was ever given in marriage at any altar. They began their married life by living at a grave and decorous boarding-house of the first class—Mrs. Le Cain's, in Summer street—full of servants, full of boarders, and of the highest respectability in all particulars. They were affectionately fond of each other, and there was never, in the history of married, bridal life, a happier beginning. Such is the universal testimony in this case.

About the 20th or 25th September she became, or knew herself to be, pregnant; the father of that child, beyond a particle of controversy, was her lawful husband. This was the last of September, a month before she ever saw young Sumner, two months before that ride to Brighton or Watertown, previous to the outrage on Shawmut avenue, where, if at all, they are to locate the crime.

It happened, as has been stated by counsel on both sides, in the opening, that not being at housekeeping, and her

husband necessarily and without the least fault on his part—creditable rather to him—detained from home about his business, she was very much alone and had very little to do, and having a sister very nearly her own age, and a very respectable friend, Miss Snow—having friends as pure as she was then, she was, in that pleasant waning summer and beginning of autumn, very much abroad. I hope I shall be excused for saying to the married men upon the jury, that the very restlessness of incipient pregnancy may have induced a desire to be abroad. It was during this time that she made the acquaintance of young Sumner, whose name, from his connection with this case, recalls many sad thoughts and memories of the disappointed hopes that cluster about him and rest upon his grave. He also was nothing more than a boy, with some capacity, I may say, for refinement of sentiment, a certain pleasing address and manner, with some susceptibility of disposition—not that he was debauched or dissolute—for his friends' sake I thank God there is not a particle of evidence that he was a seducer by profession or design, only that once or perhaps twice he was hurried away by impulse into the offer of a familiarity, revealing a warmer and more ungovernable sentiment, which was instantly repelled and instantly and forever abandoned. If evil into that immature nature came and went, as evil will, it perished in the blossom and bore no fruit.

Gentlemen, my learned brother, in opening his case, was pleased to say that he was not at liberty, by the rules of law, to give in evidence certain imaginary confessions made by young Sumner on his death-bed. My learned brother will excuse me for saying that he has not been quite so scrupulous in the offer of incompetent and inadmissible testimony, as to warrant a belief in it here. But lest there should be any, my associate, after consultation with myself, in his opening argument, challenged the learned counsel—pledging us to waive every objection on the ground of incompetency or the order of trial—challenged him to produce the brother of Mr. Sumner, who hung over his dying bed and received

his last words. We challenged him to produce him, to say whether or not, in that last hour, in that moment of unutterable solemnity, just when he was passing into the presence of the All-seeing One, he went out of the world confessing or denying that he had committed this act. Gentlemen, let the fact that my learned brother has not ventured to meet this challenge, go for the proof. Men may live fools, but fools they cannot die.

Well, gentlemen, this acquaintance began the middle of October. I pray you, as I may not think it worth while to spend time to recur to it again—I pray you take it here that there is not a scintilla of evidence that she ever saw him in her life until late middle of October. She was then pregnant by her husband six weeks. What the nature of their acquaintance was, so far as it consisted in outside, visible evidence, I think we have been able to lay before you exactly. They met occasionally in the streets; sometimes at Fera's and Vinton's saloons. I think we hear of two rides in omnibuses, in which were all four (Mr. Sumner and Mr. Porter, Mrs. Coburn and Mrs. Dalton), the omnibuses full of passengers; they drove once to Cambridge in a carriage, according to the testimony of the driver Burns, four together, the windows all open; and once only rode out alone. That she was ever out walking with him after the sun went down, that they ever met but in the broadest daylight, that he ever insulted or astonished her by an invitation to a house of assignation, that they ever met anywhere but in the broad light of day, but in the presence of everybody, except on the single occasion of the ride to Brighton, there is not a particle of proof. I advert now to Miss Snow. Perhaps you have forgotten that they asked that respectable witness, called by themselves, whether she ever knew or heard of Helen Dalton's going with Sumner to a house of assignation or a house of pleasure, and she denied that she had ever heard or known such a thing in her life. Therefore I have the honor to repeat, in order that we may not exaggerate the matter, and may have the whole of this part

of the cause before us—I say I have the honor to repeat that these interviews, Mr. Foreman, were no walks by dusk or moonlight, no meetings by the insidious and seductive light and music of the house of pleasure, no walk, no meeting, anywhere, on any occasion, alone, but a single ride on the 15th or 16th November.

Gentlemen, of this intimacy between Helen Dalton and Mr. Sumner, I hold the same opinion with regard to it that the father expressed through his tears upon the stand. I look upon it with abhorrence. I regard it exactly as Helen Dalton, everywhere, in every word she uttered, in every line she wrote, whenever her bursting tears enabled her to speak her thoughts, shows that she regarded it. But we are here on a charge of adultery, and I have the honor to submit to you, gentlemen, after the most careful and thoughtful consideration and weighing of evidence in this case, under responsibilities professionally as severe and as oppressive as those under which I ever assisted to try a case in my life; I respectfully submit, on a review of that evidence, these two views will have the approbation of every candid mind. I submit that she never came to love young Sumner with that impulsive, absorbing, engrossing love that endangers virtue and conquers shame. I submit, also, gentlemen, that there was never a moment, during their whole intercourse, when the thought of criminal connection was entertained by her for a moment—never one. Young, comely, vain, as may be with her sex and in her condition, in her father's family, trained to but little intercourse with the world, the society and pleasing manners of this young man tickled her, afforded her pleasure, playing round the head, but going not near the heart. But I mean to maintain, and I shall base the defense—a triumphant defense in this case, unless I deceive myself upon it—that her husband had her heart at first, and has it to-day; that this attachment (if you please to call it so) was merely a transient and superficial feeling, a false, fickle light on the surface of the stream, whose depths were unchanged, untroubled, undisturbed. How well she loved him

we shall see, if you will permit me to go a little into the argument of the cause. The whole case is full of evidence to show the affection of the earlier period of their married life. There are the three weeks after the Shawmut avenue tragedy; those two days when, during those three weeks, her husband having absented himself, she knew not why, she went for him, half distracted, everywhere, going at a late hour in the evening to his mother's house; her following him to jail, hovering about that cell, a beam of light, a dove of constant presence; those letters—in the whole history of the human heart there is nothing to equal the depth of feeling, the beautiful, inexpressible, undimmed affection they exhibit, down even to the very last, in which she breathes out the thoughts of a breaking heart; how well she loved him from the first, how constantly she loved him through the whole, and how light and transient and superficial was this intimacy with Mr. Sumner, I shall have the pleasure, by and by, of stating my opinion.

I say, also, for the second view of this intercourse between her and Sumner, that it is beyond all reasonable controversy, that the very first time that Sumner suffered himself to be hurried away by a momentary impulse into expressions that revealed the existence of warmer desires, she instantly met and instantly repelled them. Will you ever forget, gentlemen, that only a day or two before the Shawmut avenue tragedy, having discovered by, it may be, a touch of the foot or of the hand, the existence of these warm emotions, she thereupon repelled him, snatched her letters from his hands, tore them up, and threw them out the window? Have you forgotten that one of the letters of Sumner to her was never opened by her, but found unopened? Well did Dalton comment upon that fact when he said to Mr. Richardson, she could not much have loved him to have left his letter unopened. And I submit to you further, gentlemen,—the evidence will show you whether I am warranted in these strong introductory statements—that when at Brighton or at Watertown, he, probably for the first time in his life,

distinctly conveyed an intimation of his wishes, how she started back from him, burst out crying—on the testimony of Mrs. E. O. Coburn, their witness, and to be believed by them—and commanded that he should instantly drive her home again to Boston.

The letters were found; the Shawmut avenue tragedy was enacted; Sumner was brought into her presence and made certain statements. The next Sunday night, in the presence of the Daltons, of whom I am bound to say, although they have, perhaps with the best motives towards their kinsman, perhaps intentionally and perhaps unintentionally, urged him to this proceeding; notwithstanding this, I have the greatest pleasure in saying that they stand out in extraordinary comparison, as a family of witnesses and of blood, with that other family which figures so largely and, as I shall show you by and by, so disgracefully in the case. In their presence, on the Sunday night after the tragedy, she made a full and complete revelation of her way of life with Sumner, in the presence of her husband and of his family; admitted there, as everywhere, her own grief, shame and compunction for what had taken place, but protested her absolute innocence of the last and greatest crime, just as she had once before, when Dalton proposed that test, sunk down on her knees, with her hand on her father's gift, the Bible, and solemnly swore her innocence of that charge; just as she had, in that even more solemn moment when the pains of premature birth were upon her, in the presence of Mr. Richardson, adjured her Maker that she was innocent.

This brings me to that great fact which I apprehend you will believe to be decisive in the case, that the libellant—with the knowledge of every single credible fact and circumstance which is laid before you in this cause, and with the full and perfect knowledge of everything but this enormous and outrageous and barbarous falsehood of abortion, which was an after-thought; with a full and perfect knowledge of her intimacy with Sumner, her rides with him, her going to saloons, her exchange of rings and letters, the gift of a book,

and the knowledge of the still further fact that on one occasion Sumner, in a moment of passion, had reached his hand into her bosom; with the knowledge of every fact and declaration on which this jury will place a particle of reliance—declared, not merely by his language, but by acts and conduct the most unequivocal, that he believed her innocent of that crime, and loved and trusted her still. And so I have to repeat, for it seems to me that in this view the argument will appear to be conclusive; I repeat that down to that time, through all that interval, from the 17th November down to the 14th January, with the knowledge of every credible fact and circumstance, Dalton, who knew his wife so much better than we can know her, who knew how pure as an angel she came to his bed, who knew when she spoke the truth, who knew how tenderly she had loved him, who knew so much better than we can know how to probe her, how to practice upon her, how to surprise her into confession; he who had even a chance to watch over her sleep and hear the revelations of her dreams, he loved her and believed her innocent of this charge down to the 14th January—down to that date, I respectfully submit, the fact will not admit of controversy. Once for all, gentlemen, remember that series of letters from the jail so honorable to his first thoughts, showing him still so well worthy to be the husband of this wife; those letters from the jail, so beautiful, so manly—unless he was deceiving her, which, of course, he was not—one long, unbroken strain of music, the burden of which is “home, sweet home, and you, my loved one, my fond one, dearer and better for what has happened, you again to fill and illumine and bless it.” So it stood down to the 14th January, which brings us to a great epoch in the history of this case.

We come now, Mr. Foreman and gentlemen, to this law suit. The grand jury found no bill against Mr. Dalton and Mr. Coburn for murder, but indicted them for manslaughter. On the charge of murder they were to be released, and were released. They came abroad on the 14th January, and then

at once they were to prepare for their trial, which promised at that time to be a very severe one. The punishment for manslaughter may be twenty years in the State prison, and of manslaughter both these parties were at that time believed by the public to be guilty; they were believed to have aided in sending that boy to his dishonored and untimely grave. Public opinion, whatever that is worth, was undoubtedly against them both, especially against E. O. Coburn, as the oldest and probably the leader in that tragedy; and he having taken it into his head to console his domestic grief by stealing \$1,700 from his father-in-law's safe, by keys false or otherwise, was somewhat distrusted and as likely to undergo a pretty severe trial at the bar of public opinion. To change that public opinion and in order to a defense against the charge of manslaughter it became necessary that there should be a belief, or at least an appearance of belief, in the guilt of Sumner. And therefore, gentlemen, at some time, the precise time is not practicable nor is it necessary to fix, but at some time, and at some short time, too, before leaving the jail, it was arranged, unquestionably through the influence of counsel (not of my brother Dana, who, I believe, was not engaged in this early stage of the case), that when Dalton and Coburn should go abroad, they should not publicly meet their wives. To go into court and maintain that Sumner had attempted or committed adultery, and to maintain that in the sincere belief of his guilt they had killed him, and at the same time publicly consort with their wives, would seem inconsistent and impolitic; and so it was arranged—I do not know as I have to complain of it as an impolitic or inexpedient arrangement—that they should not meet their wives at all. Therefore it is that you hear from Mr. Richardson, that Mr. Dalton wrote to him that, although he had arranged to meet his wife at once, it would not be expedient for him to meet her until after the trial; otherwise he should be very glad to see her. They came abroad, and although in almost the very last letter which he wrote

to his wife from the jail, he expressed a desire to fly to her arms, he refused to see her and did not see her at all.

So it remained down to the 25th February. I said, and I repeat that I do not know that this was very impolitic or inexpedient, and that it is to be complained of at all; but I pray you now to see the history of the libel. The very moment he places himself in this position he comes to be in an antagonistic and false position towards her from the nature of the case; the habit of dwelling on the offenses or supposed offenses of Sumner very naturally brought his mind into something like suspicion or belief that Sumner was guilty, and that brought him to a willingness or necessity to believe that his wife was guilty too. At all events it brought him into a condition of complete perplexity of mind, and surrounded him with ten thousand influences which poured into his abused ears and loaded his bosom with jealous doubts. His family and friends, insidious enemies pretending to be friends, gossipers and scandal-mongers right and left, the whisper of public opinion to which Dalton is emphatically sensitive, the laugh of bystanders, all came around him as an atmosphere, and brought him to that condition so strikingly represented by the greatest master of the heart—"Perplexed in the extreme"—"*Perplexed in the extreme.*" He came to know what I trust few hearts know—

"What damned minutes tells he o'er,
Who dotes yet doubts, suspects, yet strongly loves."

Gentlemen, there is not in the whole history of human nature, in fact or fiction, a more remarkable and affecting illustration of the degree of perplexity to which the human mind can be brought, than this of the condition of Mr. Dalton's mind at that time.

Then we have another important fact in this case. You remember how he wrote along all the way down to the 12th January, how fondly he loved and trusted her, and how happy he hoped they would yet be. As early as the 5th February, before he heard one solitary fact or circumstance

of which we have a particle of credible evidence, so far as we can discern, before the story of the abortion was concocted to poison his mind, my brother Dana was called upon to give us notice of the libel. And then, more strongly to bring to mind another illustration of the perplexed condition of his mind at that time, do you remember that Mr. Richardson testified that Mr. Dalton told him, with all the sincerity in the world, that his wife had actually confessed to him that she had committed adultery with Sumner in Fera's saloon? "I believe her innocent," he says, and then comes on the revulsion which is the natural result of the perplexed condition of his mind, and he says, "She confessed to me that she committed adultery in Fera's saloon." Did she ever confess to adultery in Fera's saloon? You know perfectly well she never did. "When did she confess it?" "At the time of the flogging affair." And yet after the flogging affair, he holds her to his heart and his bed for three weeks, and writes her these tender and manly letters from jail. He understood exactly what she confessed then. She confessed then what she has everywhere confessed, by her words and letters, temptation, wrong, sin, but no adultery—*no adultery!* Accordingly, gentlemen, he lived with her and wrote to her, and she was his wedded and trusted wife for a month afterward. But now, in this perplexed and false position in which he stood towards her, preparing for his trial, with ten thousand whisperers at his elbow, he actually brought himself to the belief that she had confessed it! How striking an illustration that is, by the way, of the danger of these confessions! What a lesson of candor and caution and good sense it teaches a jury, as to weighing alleged confessions put in evidence.

However, there he was, from the 14th January down to the 25th February, away from her, among her enemies, his heart encrusted over, though, as we shall see in a moment, a deep fountain of love and trust was there even yet.

We come now to the 25th February. What happened then, gentlemen? This wife had been kept from his sight from the

time he left jail, on the 14th January down to the 25th February; more than a month she had never seen him. On that night, winged by that love which was stronger than the malignity of the Coburns, that love which is said (if I may be excused the expression in a cause so grave as this) to "laugh at locksmiths," she forced her way to his presence in the very house of her enemies, his enemies, and the enemies of truth. Gentlemen, what took place there on that evening of the 25th February can never, of course, be perfectly known until all secrets, large and small, shall be revealed; but I have no fear but that the intelligence of this jury will penetrate that interview, and I have no fear but that, turning with disgust from the perjury of John H. Coburn, you will see that these were the transactions of this evening. They met there after a long separation. The meeting, at the commencement was most painful, beginning in a review of the past, interrupted, of course, by sobs and tears, in which she again reviewed and reiterated, and prayed him to forgive her for what she had done, the very same story she had told at the house of his mother the Sunday after the tragedy; and then and there, I respectfully submit, you will find on the proof that the husband trusted her again completely, as he had done from the beginning, and surrendered his heart and person to her; that they then locked that door, and there remained alone until some one, rapping upon the outside, reminded them of what they seemed to have forgotten, so fast had the hours flown by that it was past nine o'clock. Instead of meeting there to make arrangements for a separation of husband and wife, which is the theory of the other side—instead of that it was a still more sad and self-reproachful confession of all that she had ever done, asseverating and constantly avowing her innocence of guilt; and he, then and there, finding he had no criminal guilt to pardon, pardoned and forgave the rest, and they locked their door and sat down to sketch out the plan of their future troubled life. It was not expedient or practicable that they should meet publicly, for his sentence was

still hanging over his head; but they sat down then and there to arrange their future life, as he in terms told her father. They parted with the understanding that the first meeting, somewhat privately from the Daltons and Coburns, was to take place at the house of Mrs. Richardson, her sister, on the night following.

I cannot possibly abstain, as I see it lying under my eye, from recurring to that mutilated letter which, because it had been mutilated, his honor declared inadmissible, but which came in by our consent last night. I ask you to turn to that and see if it does not reveal that this "poor creature" (as even Mary Hunter was constrained to call her) went away from that interview, walking in the air, in the clouds; a new world, a recovered husband, a happy future opening before her. Hear her, and not my colder language:

"My much loved husband: In our meeting yesterday, I see a bright hope and prospects of a happy future before me. Oh! dear Frank, I hope that the day will come when we shall be happy soon. I feel much happier than I did yesterday. [Why "much happier?" Because she has told everything? Because she has a great load off her conscience? No, gentlemen!] I feel now as if I had a dear husband to live for; before I felt as if I did not care to live; I had nothing to live for. But oh! what a beautiful thought now fills my heart—that I have him, dear Frank, to live for; him to build all my future hopes on; his strong arm to lean on; his dear words and sweet smiles to encourage me; and if I should ever falter, I have Frank to say, cheer up, Nellie, we shall soon be happy. It seems as if I could not express on paper my thoughts; but I long to fly to his arms, and lay my face close to his, and then tell him all my heart."

Judge you, gentlemen, judge you, whether or not that letter was written the morning after a confession that must have wrung tears from the eyes, and drops of ruddy blood from the heart of the husband who parted them forever! No, gentlemen! I repeat, they met; the meeting was sorrowful at first; at first it was a review of the melancholy past; it was repentant of that past; it was the assertion of innocence; it was the delicious belief of innocence; it was the arrangement of a future life, based upon that belief;

and therefore it is that when she awakes the next morning a new sun is shining, there is a new heaven and a new earth.

But what followed? He could not be publicly seen with her, and Edward O. Coburn went home with her that night, and Edward O. Coburn had discernment enough to find out how it was with them—that she had won her husband back again; and even he, although he is a man who will mutilate her letters and turn them by forgery as far as he can into a lie, even he was obliged to admit upon the stand that she told him that she felt better that night, for she was going to see her husband again the next night. Then it was that these parties, the Coburns, finding that the husband and wife were going to come together again at last, and that all was likely to be over, then and there it was, I respectfully submit to you, that they fabricated and reported to Dalton this hideous and unutterable falsehood of the abortion by the instrument of Dr. Calkins. I submit to you, gentlemen, that then and there it was that they approached his abused and ready ear with that infamous story of abortion. There was exactly enough of truth for falsehood and malignity to work upon. The truth had been exactly this: Mrs. Dalton had suffered a premature birth. Grief and care which were entirely adequate to produce the effect, according to the testimony of the medical witnesses who have been upon the stand, had prematurely nipped in its bud of life her progeny. Three times, including the last one, she had been attacked by the pains of miscarriage, and three times that Christian matron, mother, of whose credibility I shall by and by have the honor to say something, but on whose credibility I with undoubting confidence rely—this Christian mother, when these attacks came on, herself familiar with that agony and pain, applied to her a mother's care and a mother's love, and along with these those old mother remedies, warm water for the feet and composition powders; not to produce miscarriage, because that event was believed to be inevitable, but in the vain idea—for Dr. Clark has told you that they were worthless for this purpose—that they might

a little relax the system and diminish the agony, and if miscarriage must happen, a little relieve the sufferings of her child. If for that this Christian mother is to stand condemned and judged as a party to the murder of that young life, God have mercy upon us! I hope there is no one on that jury who is a victim, as I am, periodically, to sick headache, as I should just as soon expect to have my wife accused of murder, because when that torture is upon me, she is in the habit of coming to me with a little warm water and bathing my head, in the hope that possibly it may relieve in some degree the agonizing throbs. Is it administered to cause sick headache—judge you as you would be judged—or in the hope that the pain would be assuaged, the system relaxed, the time of suffering shortened? This is what they have done. The two first cases of this difficulty passed off. While she was suffering from the third attack, her brother-in-law broke in upon her and told her that her husband had refused to see her and to live with her, and then, after an agony of tears and another appeal to her Maker that she was innocent, the miscarriage took place.

On that foundation I say, gentlemen, I submit it is perfectly true that these men then and there fabricated, out of whole cloth, the story of an intentional abortion by the agency of Dr. Calkins. I shall by and by have occasion to show you how unutterably false is that story; false everywhere, disproved by the weight of irresistible evidence in this case. But I advert to it here and now only for the purpose of showing you how it was that the last blow was struck, and Mr. Dalton was, for the present at least, if not forever, separated from his wife. And that fiction did the business, and he thenceforward surrenders himself to his friends, as they called themselves—his enemies, as I think—and here he is, upon such testimony as they enable him to lay before you.

Our habits are for public trial and investigation, and our liberties will last just as long as our trials are public, and not a moment more. We agree in that; we have this love of

a public trial from our ancestors. Who does not remember a remarkable case a few years ago when her majesty the queen of England was arraigned before the House of Lords on a charge, and assailed by a body of trash, compared with which the evidence of Mrs. Coburn is as innocent as one of Dr. Watts' psalms or hymns. And here I would like to ask your honor and this public, whether or not, if it had been proposed to try that cause under lock and key at a long table covered with baize and by lamp light, the people of England would have borne it? They would have thrown every lord and bishop into the river, and piled the stones of the parliament house on their heads; but they would have seen that trial and heard that trial. Do you think that was for the love of offensive exhibitions, gentlemen? I have the honor to believe, for the country of my descent and yours, that was the old English love of fair play. They wanted to see how this was to be done, and how it was that a set of Italian rascals and villains that ought to have been hanged forty years before they came over to England to testify, were going to prove that the greatest of queens could become the wickedest of women. It was an inclination to see that done; and if John H. Coburn must separate this man and wife, people want to know how it is brought about, and surround the jury to see with their eyes and take something of the benefit of their judgment. Shame to him who evil thinks! I said, and say again, no man is hurt by this trial who was worth saving when he came into court. Shame to him who evil thinks! The man, the mind, the heart that could go through such cases as this, listen to this sad, melancholy story of bridal love, of jealousy, of misery, of sorrow, of broken hearts, of willful perjury, and carry away no impression but of its obscenity, reminds one of an expression used by the pastor of your Brattle street church, who said he could go through a gallery of art, containing the pictures of heroes and demi-gods, with no impression but that they were all stark naked. Shame to him who evil thinks! Let us, gentlemen, not suffer our delicacy to prevent our doing our

duty; the result is to be one which may interest the heart and affections and improve the life.

We begin this trial, Mr. Foreman and gentlemen, by taking with us a familiar principle of the law—by the presumption that everybody, and especially the defendant, is innocent until clearly proved guilty. We begin with the presumption that it is in the last degree improbable that a young bride, in the fifth month of her marriage and the second month of her pregnancy, affectionate, modest, of Christian training, has committed the greatest crime of woman. We take with us, gentlemen, merely that the circumstance that she has been engaged in what Edward O. Coburn said he thought was a flirtation, and nothing more, with young Sumner, does not prove that the last great step is taken. We believe this, and take this with us, because we know it to be so, perfectly well. We ourselves and those we love best, rejoice to know that it does not follow because one step has been taken, all have been. We take with us the ordinary principle, too, by which circumstantial and other evidence of adultery is to be weighed. I had the honor to call the attention of the court just now to an authority upon this subject. It is not worth while to trouble you with it, but I pray his honor to take notice that throughout the burden is upon the libellant to prove his case clearly and undoubtedly; that every invisible fact and circumstance goes for nothing at all; and that throughout, if everything that has been established by credible evidence is fairly reconcilable with the innocence of the party, in reference to the great ultimate charge, there is not a tittle of proof in the case.

With this we start. It is the crime of adultery, Mr. Foreman. It is an intentional and deliberate surrender of the person unlawfully to another. No surprise at the window, no sudden placing of the hand within the bosom, instantly and by a flood of tears repelled, is adultery. There must be some intentional, intelligent, voluntary and consummated surrender of the body; and this established by evidence clear and undoubted, or there is no case. No such case is established or

begun to be established before you. It would express my opinion, gentlemen—and if I should allow myself, what I would prefer to do, to make a very short address upon this evidence, I should leave it upon that—it would express my opinion exactly of the state of the proof, if I should say that, until you come down to the alleged confession of John H. Coburn, there is not a particle of proof, not one fact, not one declaration, that tends in the least degree to prove the guilt of the defendant; and of John H. Coburn's testimony I should say, it was the most barbarous, beastly, incredible, impossible perjury that was ever attempted to be passed upon a jury. And if my object, as I said before, were merely a verdict of acquittal upon this charge, I would leave it there, or rather I would proceed at once to the discussion of the testimony upon that fact. But the importance of the cause and the novelty of the trial make it necessary to go a little further; and therefore I beg leave to submit my commentary upon the whole proof under this arraignment, and I commend it to your attention, as it will enable you to see where I am in the progress of the discussion; and I will enable you to give me credit for believing that if I do not at once place or in one moment, reply to a piece of evidence that lies in your own mind, according to the arrangement I have proposed, I shall do it in another.

I have, therefore, to submit to you that every particle of credible evidence in this case, until you come down to the testimony of John H. Coburn and the alleged confession of the 25th February, is perfectly consistent with the innocence of Helen Dalton; and I shall respectfully submit that if it rested there, on the whole case as it existed down to that evening, you would not leave your seats to find a verdict for the defendant. I shall then have the honor to submit to you that Mr. Coburn's evidence is not entitled to a moment's belief. I want you, gentlemen, first to try all that evidence yourself, and after you and I have conferred a little upon it, I shall respectfully once more ask you to appreciate the great fact, that upon every single word of it, every fact and

circumstance, Mr. Dalton himself pronounced his own judgment and declared that it did not convict her of guilt.

In the first place let us look at it for ourselves. It is usual in cases of alleged adultery for the libelant or the commonwealth, or whoever has the burden of proof, to begin by what is called positive proof of what are called proximate acts; that is to say, direct positive evidence of certain acts committed by which a party approximates to a surrender, evidencing an immediate commission of the crime. Direct evidence of the commission of adultery is of course very rare, and is never demanded. Positive evidence of these proximate acts, such I mean, of course, as the parties being found very near each other and apparently surprised, rising hastily, dress discomposed, one running one way and another another, confusion, hesitancy, embarrassment—positive evidence of that kind of proximate acts is ordinarily the evidence by which adultery is established in a court of law. Accordingly, on a late occasion, in the immediate neighborhood, of which everybody, except perhaps my brother Dana, may have heard something, that was the admitted line of proof—positive proof of alleged proximate acts.

The first remark that I have to make here is, that there is not the first particle of evidence of any proximate act.⁷

The burden being then upon the libelant to establish beyond a reasonable doubt the fact of the adultery, and the libelant failing altogether to produce the ordinary evidence of a positive character of proximate acts, we pass on—still, as you understand, gentlemen, confining ourselves entirely to the state of the proof, before we arrive at the alleged confessions—we pass on to see what is the nature of the proof relied upon by the libelant. And you see that it is circumstantial evidence only of adultery. They rely wholly upon circumstantial evidence to prove the alleged fact of adultery. I speak of this intermediate and earlier period, let me say, in order that I

⁷ Here *Mr. Choate* analyzed the testimony to show that no proximate acts of adultery had been shown.

may be perfectly appreciated by the jury, before and independent of the alleged offense sworn to by the Coburns, and I remind you that it is no more, at the best, than circumstantial evidence of adultery. I need not pause to remind you how much caution, how much candor, and how much intelligence are requisite in appreciating circumstantial evidence in any case. That kind of evidence may clearly prove guilt. That many times, however, it has also shed innocent blood, and many times it has stained a fair name, I need not pause for a moment to illustrate or remind you. Instead of doing that, I think I shall be better occupied, under the direction of his honor, in reminding you of the two great rules by which circumstantial evidence is to be weighed, appreciated and applied by the jury. Those rules, gentlemen, are these:

In the first place, that the jury shall be satisfied, beyond a reasonable doubt, that the circumstances relied upon to prove the fact really existed; and then, when these circumstances are clearly and certainly established.

In the second place, it is a rule of equal, or even more importance in this case, that the jury shall be satisfied that they conduct, as a necessary result and conclusion, to the inference of guilt. It is a rule that may be called a golden rule in the examination and application of this kind of evidence which we call circumstantial, that should it so turn out that every fact and circumstance alleged and proved to exist is consistent on the one hand with the hypothesis of guilt, and on the other hand consistent, reasonably and fairly, with the hypothesis of innocence, then those circumstances prove nothing at all. Unless they go so far as to establish as a necessary conclusion this guilt which they are offered with a view to establish, they are utterly worthless and ineffectual for the investigation of truth. I had the honor to read to the court this morning, and possibly in your hearing, an authority in which that familiar and elementary doctrine was laid down, a doctrine every day applied, everywhere recognized as primary in the appreciation of this kind of evidence. It is not enough that the circumstances relied upon are plainly and certainly

proved. It is not enough to show that they are consistent with the hypothesis of guilt. They must also render the hypothesis of innocence inadmissible and impossible, unreasonable and absurd, or they have proved nothing at all.

I might illustrate this by reference to cases and by reference to the practice and experience of courts of law. But there is no need at this moment to detain you upon this subject and I pass at once to the examination of the circumstances relied upon by the counsel for the libelant to prove the charge of adultery. I think I may very well put first, as the foremost upon which they here insist, as the capital fact and circumstance upon which they mean to rely, that Helen Dalton, having been conscious of the guilt of adultery, practiced, by the aid, assistance and advice of her mother, the crime of intentional abortion by the agency of Calkins' instrument, to conceal that guilt. That, I respectfully submit, is the fact, and the great fact that the libelant insists upon in this case. That is the circumstance I have had the honor already to submit to you, by which they at last determined the yet undoubting mind and heart of Dalton. That was the capital suggestion by which they at last approached him and persuaded him to abandon his wife and institute this libel. That circumstance is also the first and main one through which, from the first three days of this trial, they appeared to gain the ear of the public and the press, and by which they made an impression upon you.

I have the honor to insist upon the evidence, by leave of the court, that a more enormous and manifest falsehood, in the color of circumstantial proof, was never laid before a jury. What is this circumstance, exactly as the libelant by his testimony, brings it before you? We learn from the testimony that Helen Dalton, having been threatened with a natural miscarriage in the manner indicated in the evidence upon the stand by her mother, and corroborated more particularly by other testimony; having been threatened with a natural miscarriage once, twice, and a third time, was assisted by her mother by some of those feeble and accustomed old woman's

remedies, warm water applied to the feet—composition powder to be taken. It is not the charge, and I understand that the learned counsel will not venture to take the ground, if it be true in point of fact, as upon the evidence has been shown to you, that she was merely threatened with a natural miscarriage, and in order to break its force, alleviate its pangs, and, if it was inevitable, abridge its duration, her mother applied the remedies; but the charge is this exactly: that, being perfectly well, liable to bear a child, whose countenance might tell the story of guilt, fearing the revelation of a natural birth, under the advice of her mother, attended by her mother and counselled by her father, she was conducted at first to an irregular operator who performed an artificial operation for abortion. That is the ground taken by the other side; and it is between these two theories, upon this part of the case, that I have the honor of comparing the weight of the evidence and invoking the intelligence of the jury. I ask, gentlemen, which theory it is that commends itself to you? Is it the one propounded by the respondent, proved by her mother, father, Mrs. Richardson, Margaret Ware, Mrs. Emerson, Dr. Calkins, and by everybody that it was a natural miscarriage, three times developing the threat of its approach, three times vainly sought to be alleviated by those trivial remedies of the mother, three times feared, three times provided against, and at last, happening under the anguish of the communication made to her by Dalton through Mrs. Richardson? Is it this, or is it, as they put forward; that being perfectly well, pregnant, and about to be naturally delivered, but not knowing who was the father of the child, and fearing that its birth might reveal her guilt, for the purpose of concealment she resorted to this abortion? If it is the explanation which we lay before you, of course this is all perfectly worthless as circumstantial evidence in the case. But if, on the other hand, they have established their theory, these are circumstances, I admit, of great strength; and I have, therefore, the honor to repeat that this is the capital fact or circumstance offered by the learned counsel, and attempted to be proved by his witnesses, and by which

they persuaded Dalton to resort to this libel, by which they stand or fall, upon the judgment of this jury, in their whole case.

I pray your attention, therefore, for a moment somewhat more carefully, particularly to the weight of the evidence upon this point. And the very first thing to which your attention is likely to be called, is the question: Where was the motive which induced Helen Dalton, or the mother of Helen Dalton, to commit this crime of abortion? Where was the motive to stifle the birth of life of her unborn babe in the circumstances imputed in the libel? Where was the motive? My learned friend is very well aware of the importance of that part of the case, and therefore he made it substantially the groundwork of the case, saying that he should prove, by certain evidence more clearly to be brought before you, that Helen Dalton stated that she could not tell who was the father of her child, and to secure herself from that shame, abortion was practiced upon her by the knowledge of some of her family and through the instrumentality of a low physician. My learned brother put forward the motive and took the issue; but having gone through with the evidence in this part of the case, I ask you where is the particle of evidence, credible or incredible, that Helen Dalton ever stated to any human being that she did not know who was the father of her child? Where is the witness, Edward Coburn, John Coburn, Mary Hunter, or anybody, who comes forward here to give the least color to a charge so cruel and yet so decisive as this? If they told my learned friend so, upon consultation with him, before they appeared upon the stand, I can only say that when they came before this court, and into the light of this room, they did not dare to repeat it. I can only say, that if anybody told him so anywhere, when they came here, that which was a mere fiction in the beginning, their memory refused to enable them to repeat in your presence; for I have the honor again to submit to you that, from the first to the last, there is not a scintilla of evidence from any witness, even from the most disreputable and untrustworthy

of them all, that Helen Dalton ever breathed a doubt to mortal man or woman of the paternity of her yet unborn babe. On the contrary, if it were necessary to consume your time upon this point, I might show you by Miss Dalton and other witnesses, that it was known to everybody, or assumed by everybody, that Dalton was the father of the child. Mary Hunter tells you that this savin about which she gives you so much information, the leaves of which may be as large as your thumb-nail, or as large as the New York *Courier & Enquirer*, she don't know which, was given to bring along Dalton's child. It was Dalton's child, by the testimony of all, that was to be made to be born before its time; and from the testimony of no one, in view of the evidence, light or dark, is there a suggestion that she ever feared in her life that it should prove otherwise. Where then, I ask you, does my learned brother find a warrant for that opening which made such a lodgment in your minds and in the minds of the community a fortnight ago, when this case commenced, the assertion that she said she did not know who was the father, and not knowing what father's face might be painted upon its infancy, she decided to destroy it? I respectfully submit, upon the other hand, that it is demonstrated in the course of the evidence, so as to leave no doubt upon the mind of a human being, that whatever else there may be in this case to regret, and whatever else there may be to investigate, Dalton was the father of that child; that it was known to him, that it was known to her, that it was known or believed to be so by everybody. And therefore the foundation of this most cruel and yet influential pretense is struck from under their feet.*

Can it be that rights like these, that affections like these, are to be determined by the jury against proof or without proof and in the face of a body of such proof as that with which we confront it? On the other hand we have the

* Here Mr. Choate reviewed the evidence to support his statement, and to show that this testimony was not contradicted.

honor to lay before you, first, the testimony of three witnesses swearing to the matter, directly and distinctly as within their own knowledge; and, secondly, that of two experts who apply their knowledge of science to this subject, and who declare that the knowledge of conception must have dated back as far as the last of September or the first of October.

Starting from that, the next inquiry in this case is, when and where did Helen Dalton first become acquainted with Sumner? That at that time she had ever known such a man as Sumner, not a human being contends. And yet the time of that acquaintance has a very material bearing upon the alleged statement that she said she did not know who was the child's father; and in order to show you the utter groundlessness of that charge, I have only to remind you that they have not produced one scrap of evidence that she ever saw the person of Sumner in her life before the middle of October. And she bore in her bosom a pregnancy of a month, or at least of two or three weeks, before she ever saw him in her life. I contend that nobody's suspicions have ever dreamed that there was any colorable pretense for the charge of an unlawful connection with Sumner until the 16th October, when certainly she was one or two months advanced in this pregnancy. There is no proof which they have been able to bring upon that point.

But I do not rest it upon the absence of evidence. How stands the matter so far as regards the direct testimony? They have introduced two direct witnesses who certainly are entitled to credit; Miss Snow, a respectable young lady and friend of Helen Dalton, and willing to be her friend and to avow herself to be her friend; and Mrs. Coburn, her sister, who would know, if any human being would know, the fact; and both declare that, to their best knowledge and belief, Helen Dalton never saw Sumner in her life up to the middle of October. Miss Snow declares that all the knowledge she has of their acquaintance begins about the middle of October, when she was introduced to him; and Mrs. Coburn, in her

deposition read to you last night, makes the declaration that it was the middle of October before she ever saw him. Are not the facts undoubted that she was pregnant, that it was known to her husband, known to her mother and her sisters?

And now, turning again to my learned friend, who says that she declared she did not know who was the father of her child, I ask him, as I asked before, where was the motive to stifle his unborn babe in the birth of life and to add this crime of murder to all the other incidents with which this case is connected? Where was the motive? Do you think it probable, Mr. Foreman—I pray your attention to the evidence—do you think it probable that this young wife, suspected by her husband and stricken to her heart because her husband suspected; who knew perfectly well that she was innocent; who hoped that it might live to be a tie and pledge to them in the days of their reunion; who knew perfectly well that she carried in her bosom, upon her infant's eloquent features, what might one day testify to the legitimacy of the child, the honor of the husband, and the virtue of the wife—do you believe that then and there she would surrender her body to this operation, to this peril, to stifle and destroy her means of proof; her most eloquent of advocates, the most powerful means by which a mother expecting and hoping for progeny could look forward to restore the alienated heart of a once loving husband, with whom she must either live or bear no life? I turn upon him, in total absence of proof of these alleged facts, and I ask what motive could she have had? I appeal, to borrow the language of the Queen of France, when, in that great trial which terminated with the sacrifice of her life, being accused of everything else, she was accused of pandering the vices of her son, she exclaimed, and that shriek went through France and through Europe: "I appeal to mothers, if it be possible!" I appeal to you if it be possible that this daughter should be led out by her mother, and trotted across the street like an unclean beast, for an operation which was to destroy the hopes of both. I appeal to you if it be possible that that mother and grand-

mother can* be believed to have cared so little about the operation for intentional abortion, as was testified by one witness, that she had performed it herself half a dozen times upon the person of Mrs. Emerson, so that she would do it as lightly and unfeelingly as a boy would shake green apples from a tree. I appeal to you, gentlemen, if our hearts and our reasons do not pronounce and denounce the whole story as a fabrication, an ingenious falsehood, without a single element of grave truth?⁹

Now, what have we upon the other side? I do not know but the trial will end in the severance of this tie; and in a general conviction of a body of perjury committed in the court-house under your eye, most hideous, most enormous, most unparalleled in the administration of criminal justice. But if it is not to come to that, then I put upon one side of this case of the charge of abortion this great fact: that we produce the positive and direct testimony of five witnesses—for I include Mr. and Mrs. Emerson, inasmuch as it is just as fully proved that the operation for abortion has been practiced upon Mrs. Emerson for six times as upon Helen Dalton once—five witnesses, hitherto respectable in the eyes of the community, who have come before you with every apparent title to your confidence, and who have opposed the declarations which the other side have brought forward, by declarations of matters of fact strictly within their personal knowledge. Three of them say that no abortion was practiced upon Helen, and two of them testified that no abortion was practiced upon Mrs. Emerson. Five witnesses swear directly as to a matter of fact, most striking and painful if it ever happened within their recent experience, which they will remember as long as their moral nature exists, if it occurred at all; and these five tell you that the story is false and scandalous and groundless from beginning to end.

I think I should hardly be warranted in an ordinary case

⁹ Here *Mr. Choate* showed that the only proof to the contrary was that of John H. Coburn, Edward O. Coburn, and Mary Hunter, whose testimony he showed was conflicting and unworthy of belief.

in detaining you another moment, if it were not very material, if it were probable, if it were not attended with consequences which I think will settle this controversy. If it were a mere naked question whether abortion was procured or not, I should leave it here; but inasmuch as, if it were not done, if that story is as false, every part of it, as any fabrication from the infernal world, this whole case goes down with it, I ask you to pause a moment longer. If there was no abortion, permit me to say, better were it for John H. Coburn, Edward O. Coburn, and Mary Hunter, if they from an untimely birth had never seen the light, than that they should come here and commit this great sin, if they die without repentance and without forgiveness. I submit that it will follow inevitably in every aspect of this case that if that story is untrue, there is not a particle of foundation to rest their case upon from the beginning.

I am not blaming Dalton. Do not understand me as blaming Dalton because he brings forward their charge of abortion. They vanquished him by it. They made a child of him by it. They made him believe that story. He took it as it was told to him, and it was no folly for him to lay it before you. It is they who fabricated it, and who by means of it have won him to this pursuit, who are deserving of our censure. Upon that I have something further to say by and by.

Now I ask you, first and foremost, whether you believe our five positive witnesses. I would not in any ordinary case consume time upon it; but if you will bear with me, I think there is a capital distinction between the testimony of the other side and that of these five witnesses, who swear to matters of fact within their own positive knowledge. If that matron mother led that blooming and innocent child across the street for the performance of this operation, she knows it. If Mr. Gove was consulted about it, or counselled it either before he went West or after his return, he knows it perfectly. If this happened at all, I submit to you that Dr. Calkins knows it perfectly. And if it was ever practiced

upon the pure, youthful, matron form of Mrs. Emerson, does not she and does not her husband know it? And yet they all declare it to be an absolute falsehood upon the stand. Can there possibly be any escape for them if they are wrong? Is not here an absolute certainty that, if they are honest and state what they believe to be true, they cannot be mistaken? Allow me for a moment to run over this part of the evidence that you may perceive its entire strength; for I want this matter put completely at rest, to put at rest your judgment; and I want your verdict to express your opinion upon this point. Let me then go over this evidence a little more in detail.

We call Mrs. Gove, who declares upon her solemn oath in your presence, that she never advised an operation, that she never accompanied her daughter for that purpose, and that she never suspected or dreamed that it was ever charged until a late period in the history of this case. You remember her testimony upon the stand and I ask you whether you believe her a willful perjurer. I know the deep feeling with which she testifies in the case. I know that she has arrived at a time of life when the future is abridged as well as uncertain and doubtful, and I believe that at any time of life she would give her own for her child; and I submit to you, if there is any ground to say or any ground to suspect that she comes here willing to peril her soul—and she sustains, I believe, a Christian character—in swearing to a falsehood. Do you believe that story to be true? Grief may have impaired her faculties to some extent. Her memory may be occasionally somewhat defective. Some exceptions may have been taken as to her manner upon the stand. But the solemnity and dignity of that Christian matron as a witness here must, I think, have given to you all the assurance you could desire that she meant to tell the truth. Is there any escape for her upon the ground of forgetfulness? Can it be that she could take part in such a transaction, and not be able to remember it, or that she does so much of it in her own house that a particular case of that kind makes no impression upon her memory? Could

she be mixed up with a domestic agony so sharp as this—could she possibly have taken part in it, led her child to the knife, and carried her back to a premature delivery—and have forgotten it? Gentlemen, there is no such escape for my learned friend as this. There is the most dreadful perjury, or she has told the truth.

But you observe, still further, that there is no excuse left upon the score of forgetfulness, for another reason. You cannot have forgotten with how much minuteness of detail she traced the history of this case. She fixed the period of the pregnancy, announced the fact that she was three times threatened with miscarriage, fixed the number of weeks as nearly as the time may be fixed, a time corroborated by the testimony in the case of the final miscarriage. You will remember that she stated with the utmost precision the kind of remedies which she applied, the periods she applied them, the effects that followed; that one attack passed away, and then, after a considerable interval, another came on; that these attacks were subdued under the influence of some applications made by her maternal care; and at last the third and decisive attack followed, hurried to its inevitable consummation by that sharpest of afflictions, announced by Mr. Richardson, that her husband refused to meet her again. I respectfully submit, therefore, that there is no room—none in the world—for escape, upon the score of forgetfulness, from the charge of perjury, if she has not told you the truth.

Permit me now to say something of Mr. Gove. He stands before you convicted of a violation of truth and a most deliberate perjury, if he had any agency, direct or indirect, or if he ever suspected in his life that the crime of abortion was committed, until he heard it in the anonymous communication of which he has spoken. I know very well that Mr. Gove's testimony is liable to criticism. With this burden upon his mind, and this long agony, threatened as he is with the lopping off the lowest and fairest branch of the family tree, I know how full his heart is, and I respect him the more for it. I know, gentlemen, that he does not dismiss it from

his thoughts an hour; that it is in his prayers; that it goes with him to his bed; that it attends him in the streets; that it lies heavy upon his heart everywhere; that it makes him forget the proprieties of his general character in the presence of one of the jury. I know that it haunts his dreams—dreams, gentlemen; he has no sleep but the sleep which anodynes supply him; and I know very well, therefore, that in regard to the trifling matters of detail, or concerning properties of conduct, Mr. Gove has not appeared advantageously. The father has been too strong for the citizen, in certain respects and to a certain extent; and I need not appeal to you, gentlemen, who may expect or fear also yourselves to be judged, to say whether or not he would commit a willful perjury upon a matter of fact like this. Is not that a wholly delusive theory, in everybody's judgment? May he not be imprudent and talkative, wish to hear whether one man or another man is to pass upon this trial which affects more than his life, because it affects what is treasured in his heart? May he not want to know about what this witness says, or what that witness says? May he not talk imprudently or even foolishly, but yet, past the middle of life, a man whose gray hairs and bald head give evidence of an approach to that time when we should be walking, thoughtful and silent, upon the solemn shore of that vast ocean upon whose waves we are to sail so soon, would he not put truth and good words on board? Is that the correct inference that a man like Mr. Gove—grown up before you, a boy from the country, of respectable and pious parentage, one of the disciples and children of John and Charles Wesley, who signs their hymns, utters their prayers daily and nightly—comes to swear deliberately and wilfully to a falsehood? God forbid, gentlemen, that we should thus judge one another in judgment! I do not appeal to your charity, to your hearts, but I put it to your knowledge of life—and you may be parents—whether you cannot appreciate perfectly how the father should be talkative, and forward, and imprudent; willing to forget, or at any rate forgetful of smaller and minute details, and yet

shrink back as if hell opened under his feet from the utterance of a lie?¹⁰

There is another single witness who, if anybody upon the face of the earth, must have known whether this charge was true or false, and that is Dr. Calkins. We who did not know who he was, or care what he was, produced him here; because we knew that whatever he was he would not dare to stand before the face of that mother and child, and tell you that that mother ever practiced abortion or assisted in it. We called him and placed him before you, and you know that, unless he adds to the other black list the guilt of perjury, the charge is groundless. As Dr. Calkins is a stranger, he was entitled to be heard before you, and I submit to you that he is entitled to be believed upon his oath, upon every principle of law and common sense, until it is shown why he should not be believed. Every witness is entitled to be believed upon his oath with regard to a matter within his knowledge, unless we have some certain ground upon which to discredit him. I ask you if there is one scintilla of evidence that should warrant you upon your oaths in saying that Dr. Calkins has sworn to a word of untruth? What is there against Dr. Calkins? This only. My learned brother addressed certain inquiries to ascertain whether he had not at some other period procured an irregular abortion. Dr. Calkins took his constitutional privilege and declined to answer. What is the inference? It is that he so respects his oath, that he dares not answer untruly; and that he could not answer untruly, without criminating himself, he took his constitutional privilege and declined to answer. What was to hinder him from giving my brother information about that bamboo-bottomed chair? What was to hinder him from denying everything, but the fear of Almighty God on the oath he had taken? And why does he stand here and swear that he did not practice an abortion upon Helen, but because he

¹⁰ Here *Mr. Choate* reviewed the evidence to show the falsity of the crime charged against the defendant and against her father.

can truly do it? I submit to you, that the very fact that he made this distinction, that he claimed this constitutional privilege in the one instance, upon which his honor instantly extended to him its protection, and answered freely in the other instance, showed that he could negative one inquiry as a man of conscience under oath, and respected his oath too much to negative the other. Although I disapprove of what we may conjecture his practice to have been, I thank God that herein we may see another illustration that a man may do one wrong and commit one irregular act, or one breach of the law, and yet that he is not necessarily a devil incarnate, a perjurer, or an adulterer.

I go further for Dr. Calkins and say this: Disapproving altogether of his bamboo-bottomed chair, unless it is an easier one than I have been accustomed to, I have this to say for him, that there is not a scrap of evidence in here that he has taken an infant's life, or endangered a human mother—not one. In coming before you, I know nothing of reputation, and you know nothing of reputation; we know nothing but the evidence of the facts, as they have been by law laid regularly before you.

Three witnesses, then, the only ones who have spoken upon the subject, declare this charge of abortion against Helen Dalton to be false. Are they not corroborated?¹¹

I should be glad to know, also, if there is any corroboration of the assertion that here was an intentional abortion and not the natural progression of a miscarriage. I should like to know why we have not further evidence about it from this family. How comes it to pass that this young woman, passing to Pleasant street and going to Dr. Calkins, no human being in or about the house ever heard or dreamed of it? Mrs. Richardson did not know it; and how comes it to pass that Mrs. Emerson, who spent that very Friday there, upon the evidence of the mother and daughter, who heard her mother say that she feared a miscarriage—how comes it to pass that she knows nothing at all about it? It negatives it. If Mrs.

¹¹ Here *Mr. Choate* stated the corroborating testimony.

Coburn is not wilfully perjured, and that will hardly be contended here, you have this striking fact. The testimony of all these parties refers to the successive attacks, and to the fact that the mother feared a miscarriage; it shows that she called upon Helen to lie down and keep still in order to prevent it; she kept her still and recumbent, and in two cases it all passed away; she administered the harmless foot-bath and composition powder, to diminish its pangs if it should not pass away. I think, too, there is corroboration in the testimony of Dr. Clark; and in this whole case, if her story is corroborated anywhere, I think you will find that corroboration here, that it is an ordinary case of natural miscarriage, the result, it may be, of grief or care. Dr. Storer and Dr. Jackson have testified that it belongs to this great trial of woman, extraordinary and mysterious, this bearing of children in pain; it is a part of the law that not only physical disease, accident, physical calamity, but the labor of the heart, sorrow and anguish, fear and doubt, and mental pain, may produce this effect—it is the ordinary history. These remedies rather mark the purpose of the mother to soothe her nerves for the purpose either of securing her from miscarriage, or conducing to her comfort in that untoward event.

I intend, if my feelings will allow me, to bring this whole series of correspondence, by and by, in its order before the jury, in demonstration of the merits in this case. It will be useless to turn to that correspondence now. Suffice it for the present to say this: What becomes of this theory of abortion upon the other side? The story is that, being well enough, feeling herself pregnant, and not knowing who was the father of the child, she decided to submit to this operation, and put it to death. And upon this view of the case, this whole operation should be conducted secretly and without the knowledge of her husband; whereas we see by his letters, as I will show you more completely and regularly by and by, she apprised him from attack to attack, exactly or substantially what was the matter, exactly or substantially what they

all feared, exactly or substantially what her mother was giving in order to alleviate her pains if the miscarriage was to happen, and after all, she congratulates herself, congratulates Dalton, that she will give him a child at last, and moots the little playful conjugal question, "Shall it be a boy or a girl?" I will not trust myself now to read from her letter, but the result is an ample demonstration that her father, mother, sisters, all knew of it.

I now put it to you, as I said before, that if our confidence in human testimony is not to be abandoned, that apparently just, pure, comely, intelligent and still young wife, swore to the truth when she said that she never had abortion practiced upon her by instruments, or by purpose, in her lifetime; that she had suffered one certainly natural miscarriage, and possibly another, may be true; but the whole story as it was told here, in every part and parcel, in substance and in color, was wholly false. We must believe that somebody tells the truth, and we must believe that one or another swears falsely. I do not think it a very wise position to maintain that a witness upon one side swears intentionally to a falsehood. It is a hard charge to bring—a dreadful crime to impute. Better is it to adopt almost any supposition, to solve the case, than that supposition. But we are here in this painful and remarkable position—somebody has perjured himself or herself before God Almighty. That we know. We have only by our best lights to say who, the one or the other, has done it. You are not, therefore, brought at all to the painful dilemma of being obliged to take a certain theory of a case, or to say that an individual has sworn untruly. Edward O. Coburn and John H. Coburn have perjured themselves, or five respectable witnesses have perjured themselves; and I put it to you, upon this solemn responsibility of your oaths, to declare whether you do not believe Mrs. Emerson and her husband, and these other witnesses.

What do they go to next? It is said—and this brings me to an interesting and very important part of the case—that there was an intimacy between Helen and Sumner: walks,

drives, rings exchanged, a book given, an intimacy of some weeks, a light, frivolous, objectionable intimacy, one which, as long as she is a living woman, is to be the sorrow and repentance of her life; and so there was. They will say, as Edward O. Coburn expresses it to Mr. Matthews (that was the witness, I think), that there was a "flirtation" between Mr. Sumner and Mrs. Dalton. I answer, gentlemen, yes, there was; and I answer also, exactly in the words of Edward O. Coburn and Mr. Matthews, in the same conversation, that it was only a flirtation—that it went no farther than a flirtation—that it might have gone farther, but was stopped. I answer thus this great piece of circumstantial evidence on which they rely, therefore, in the words of their witness, that it was a flirtation only, and there it stops.

I answer in my own language also, in the next place, gentlemen, which I greatly prefer, that this intimacy, which since the days of Joseph Addison, has been called a flirtation—a vulgar, coarse word, but one that best expresses the idea—this series of conduct, however, which we call flirtation, as circumstantial evidence to prove the fact of adultery, is wholly worthless. And this is a point on which I hope, gentlemen, at some little length, with some care—not unmindful of my duties as a parent, a citizen—to lay before you my views also as a lawyer and in a court. I repeat and I submit to your honor's direction, and upon the authorities, that this kind of intimacy that is characterized, as Mr. Coburn characterizes it also between the parties, as circumstantial evidence of the crime of adultery, is wholly worthless; and for this decisive reason—founded upon the nature of circumstantial evidence—that it may perfectly well consist with innocence of that great crime. With propriety, with decorum, with a proper respect and regard to reputation, I agree it cannot consist, and does not consist; but with innocence of the least degree of the crime of adultery, I submit that, as circumstantial evidence, it is absolutely worthless, and upon the broad ground that it may perfectly well exist and be committed and yet no crime of adultery shall have been committed.

I have to ask your attention, gentlemen, a little more particularly to the exhibition of this proposition of evidence under the rules of law and then to a brief examination of this case; and I submit what I have to say here under three views. But, notwithstanding my entire concurrence with the counsel on the other side, and with the father and with the child in regard to the indecorous, the light, the frivolous character of this kind of conduct, or anything characterized as flirtation, I submit to you, on the whole course of this evidence, it is perfectly clear that Helen Dalton never came to love Sumner with that engrossing, impulsive and absorbing love that endangers virtue and conquers the instincts of shame. I shall submit it to you on the consideration of the evidence applicable to the case. I shall submit to you, further, that it is perfectly clear, that the very moment she discovered that in his case his warmer feelings were carrying him beyond the line of propriety, and threatening a solicitation of personal guilt, she started in a moment from his advances. And I shall submit, thirdly and lastly, that this Mr. Dalton himself, with that knowledge of every single fact and circumstance that made up that entire series of intimacies between Sumner and his wife, came deliberately and intelligently to the judgment that she was wholly innocent of the crime for which she is arraigned here to-day.

Under these three views I beg leave to submit to you some thoughts on this part of the case. Now I had the honor to say—and I shall in a moment refer to the authority that warrants what I insist upon in that behalf—that this matter of intimacy which is characterized by this name, as a circumstantial evidence of the crime of adultery, is not entitled to the least consideration. I have the honor to submit to you that there is no fact in all our social life better established than this: that a young married woman may admit that kind of intimacy and accept a certain degree of pleasure from it, and yet at heart shall never be touched for an instant by the sentiment of a dangerous love, and start back when the proposition of crime is intelligibly made to her, as if hell was opening under her feet. I submit as the result of all our

observation of life and of books—our Edgeworths, our Walter Scotts—all that we have observed everywhere, proceeds upon this distinction and reasons upon it—every observer puts the flirt in one class and the adulterer in another, and everybody understands that they belong to a totally distinct species of characters, that a totally distinct moral and censorial treatment of them applies to them everywhere. We ridicule and satirize her whom we call vain, light, coquettish; from the adultress we turn away with aversion and tears. We satirize one as foolish, and turn from the other as wicked. We hold up one as a warning to herself for her own correction; of the other we say: “O no, we never mention her.” One is weak, the other is wicked; one has a right, I submit to you, gentlemen, to the benefit of the exhortation of parents, the protection of law, the protection of public opinion, the care of a husband; from the other, duty, public opinion, religion itself commands us to turn away and to tear her from the heart, although its fibres part and its blood follows in the effort. Is it not a fact, gentlemen, not very pleasant, not very creditable, but perfectly well known to us all through our observation of life, that many a woman, married woman, may hover and flutter for half a lifetime in this region of vanity, flattery and coquetry, and yet never dream of taking the dark descent below? Is it not a fact as well established as any other, that falls within our observation? How many of them will flutter their plumage and incline their ear to the music of flattery, and even allow it to be polluted by the whisper of a half suppressed warmer passion, and yet, when the romance is broken by the solicitation of chastity, will start and put their hands upon their ears, and fly as if a goblin damned was revealed before them! I submit to you, gentlemen, that it is a fact perfectly established by all our observation of life, that many a woman may indulge in this sentiment, and accept this treatment and feel this pleasure, whose heart is never touched by an illicit love, and I need not, I think, submit to you—your knowledge of life is enough for it, gentlemen—that, unless the heart is conquered, adultery is utterly impossible.

I return, gentlemen, to maintain my proposition. On the law, I respectfully submit that this conduct on which my brother is by and by to insist as evidence circumstantially proving the commission of the last crime, is worthless as circumstantial evidence to establish it. And while I place myself on that ground, I know, gentlemen, that you cannot by any possibility misunderstand me so much as to suppose I am defending this kind of conduct. I believe I go as far as anyone of you in my judgment of it; I believe I know I ought at least to go as far as you in my moral condemnation of it. I believe to adopt in advance every word of the polished and expressive exhortation of my friend who will address you on this subject. I agree with him in every word he says of its indecorum and its levity, its frivolity and its danger. But I meet him as a lawyer and on the judgment of this jury, on the knowledge of life, on the language of every observer of life and all we know of it, we know that many women have gone so far and yet could never be suspected of having taken that last final step.

In that immediate connection permit me to remind you of his honor's direction of the course of law which should govern this case. The learned judge, in the case I had the honor to refer to this morning, had occasion to comment upon certain letters that go beyond any letters to be relied upon in this case—to comment upon them and the conduct on the part of the wife. I am permitted by the court to read the passage to you; it is from one of my learned brother's ecclesiastical judges, and I think he at least will approve of their judgment. He was a man, a good man, who knew life too well to make an illogical, a barbarous, a beastly inference from conduct that he disapproved; we knew that ten thousand fashionable women came home at midnight, one o'clock, two o'clock, from a party at which they supposed themselves to be honored, to find their husbands asleep, aye, and to be conscious of a truer pleasure and deeper love when they lay down by his side, than they received from the admirers of an evening. It is a pleasure only too agreeable to a light, susceptible

and easily flattered nature, playing around the head, but coming not near the heart; and, therefore, gentlemen, I feel no doubt or difficulty that we should be able to agree in our judgment of the act on its true quality as a ground of inference in relation to the grave charge they have brought here. But let me read the charge of the learned judge:

"The letters have been much examined and commented upon. I have read them over and over again; but I do not intend to follow the counsel in their comments. They are written in an ardent and romantic strain; Bushe soliciting interviews for criminal purposes, for it is impossible his object, in thus addressing a married woman, could have been other than criminal, or that when a married woman receives such letters from a married man, but that she must know they were for licentious purposes. Still, however, some women will go a great way without proceeding to the last extremity of guilt; and the court must be satisfied, not only that there has been a surrender of the mind, but of the person."

"Women will go a great way without proceeding to the last extremity of guilt;" therefore, that she has gone a little way or a great way is not proof of guilt by the oaths of this jury in point of law. It is not proof of guilt, it will not warrant an inference, and it is beyond all manner of controversy, therefore, that here and now, unless they can go further, much further than to those moral and ordinary platitudes in which my brother will by and by indulge, about the impropriety of such conduct as this—which he cannot by possibility paint in anything like the strength of condemnation in which it shows its effects here to-day—an answer to all that is, that we agree with him perfectly, but that is worthless for his argument. Unless, therefore, he can go further than that, and show you beyond the fact of intimacy and beyond the fact of flirtation, that there was this consummated act of guilt established by other collateral and stronger proof, then I respectfully submit that he totally fails on this part of the case, on the doctrine of circumstantial evidence.

Now, gentlemen, I have been laying down the law, so to speak, under the direction of the court, in regard to this kind of evidence and I have only now to say, leaving the point and proceeding to the proof, that if there ever was a case in the

world where a young married woman might feel a certain degree of pleasure in this description of intercourse, and yet not commit a great crime, I think it would be this. I ask you if you believe it probable that a young wife, eighteen years of age, in the fifth month of her marriage and the second month of her pregnancy, modest to an extraordinary degree, as her husband attests, a child of schools, a child of religion, has all at once committed this great crime? If a writer of romance should put forward such a case, would you not say he did not understand his own foolish business, and that his case was extraordinary and unnatural? Do you believe it probable, do you believe it credible, that those instincts of shame, those lessons of virtue, those lessons of childhood, those words of the holy man by whom they had just been united in marriage, those prayers, those hymns, those hopes, were all lost in a moment? I admit, gentlemen, not very much accustomed to this kind of society, probably never in her life having received the attention and address of a young man like this, she very naturally felt a certain degree of pleasure in it—that kind of pleasure that applies to the head, but does not come near the heart, to which the heart which is wise replies: Can this be joy? But the instant the mask was attempted to be or was thrown off, that instant she saw it was not her beauty, or her conversation, or her manners that made the attraction, but that the aims were lust, she resisted and fled. If then, gentlemen, I am warranted in my position—as I think you will agree with me, as I know I am upon the law—that this series of conduct which we call a flirtation is not circumstantial evidence of guilt at all, this case presents the strongest possible illustration of that fact.

There is a cardinal rule for the interpretation of circumstantial evidence which I referred to yesterday, and which I deem of such vital importance in the case that I will read it to you again:

“When the facts relied upon are equally capable of two interpretations, one of which is consistent with the defendant’s innocence, they will not be sufficient to establish guilt.”

That they are irreconcilable with positiveness of guilt, as well as of innocence, gives them no value as proof of the fact. It will not, therefore, be enough for my learned brother when he comes to comment upon the circumstantial evidence in this case, that the facts are always and throughout consistent with the supposition of the crime of adultery. Unless he can go further and show that they necessarily lead to that conclusion, and that they are utterly irreconcilable with the hypothesis of innocence, they are worth nothing for any purpose. We take with us also, gentlemen, in this investigation, what I had the honor to lay before you yesterday as a universal maxim of life and society, that that kind of intercourse between a married woman and another not her husband, without his knowledge, which we generally denominate as a flirtation, is utterly unavailing to prove the crime of adultery, for the reason that it has been universally observed, that it may be entirely consistent with the innocence of the accused. I had the honor in bringing that maxim to your recollection yesterday, to advert to Addison, Edgeworth and Scott. It has been recorded and proved, and by the kindness of my learned friend, I am enabled to bring to your recollection another recognition of that fact, in one of those pregnant and solid judgments of that great and stern moralist, Dr. Johnson: "Depend on it, sir," said he, "there is a vast distance from familiarity to that great and last crime—a vast distance." It is quite apparent, therefore, that in order to make anything of this series of conduct on the part of Mrs. Dalton, the libellant is called on to go a great deal further. And I submit it is perfectly clear that he is to go so far and take this step; that taking her entire little life as before us, from January, 1855, down to the last letters which she wrote to her husband in answer to the cruelty of this libel, he must show you that she had conceived a passion of illicit love, so vehement and so absorbing towards Sumner as necessarily, when opportunity was afforded, would lead to the commission of the offense with which she is charged. They must take that step, or they do not advance in the least degree the

inference of guilt from the circumstantial evidence of this trial.

Now, I am about to have the pleasure to lay before you conclusive proofs, that if you take that life from January down to the last period to which the evidence in the case has traced it, it is perfectly manifest that the general and habitual tone of her sentiment, of her affection, was steadfastly for her husband; that she loved him affectionately, deeply, constantly, and always, and although she might have been a little influenced, her love a little suspended, by this intimacy, which she and all of us so greatly regret, that it revived again, in all its original strength, the moment the sharp realities of life brought her back again completely to herself. And I shall respectfully submit, in the next place, that whatever your opinion may be as to the extent to which this intimacy with Sumner had proceeded, and how far her interest in him had been carried, it is perfectly plain, on the evidence introduced by the libelant himself, that it stopped short, wholly short, of the commission of the last great offense.¹²

I suppose my learned friend's argument will be upon this point to bring in his ecclesiastical law books to prove that they have somewhere broached the doctrine, that if there is proved to have been unlawful love and opportunity, the jury may infer the crime. I ask your honor to instruct the jury

¹² Here *Mr. Choate* referred to the two letters in evidence, written by Sumner to defendant, one of which was never opened by her, and both found in an exposed place. From these facts he claimed that the letters could not be relied upon as proof that the defendant loved Sumner, but implied a contrary inference. He explained why the evidence of defendant's letters to Sumner had been ruled out. He then reminded the jury that their oaths forbade them to consider testimony which the court had excluded, in arriving at a verdict. He contended at great length that none of the letters contained evidence of defendant's love for Sumner, nor of guilt between them, and that this theory had not been sustained. He then commented on the circumstances of the defendant's last ride with Sumner, to Brighton and Watertown, and claimed that this testimony revealed nothing criminal or unnatural.

that whatever such authority may be quoted, we have no such law as that in this commonwealth; and upon this point I pray your honor's attention to the case of *Dunham v. Dunham*. I claim that we are not bound by it, whatever those works may declare. They seem to be of the opinion that where there is unlawful love and an opportunity, adultery is necessary as a sort of chemical result. Do they forget that there is such a thing as free will, such a thing as conscience, such a thing as recollection of the teachings of religion, such a thing as shame, such a thing as a point at which to stop and a point from which to go back? They forget the inherent virtue that pervades the nature of woman. They forget such a word as that. And therefore I say that the doctrine is old, poor, monkish, artificial, and has never been adopted in this state, and never, as my learned brother will present it to you, in any country; for I believe the work holds that if it turns out that the opportunity did not as a matter of fact carry the parties to the guilt, there is an end of it. I contend that there is no divorce to be granted for loving or for having an opportunity, if the parties do not indulge. There is no proof of such indulgence; and therefore every word of the evidence that I have brought before you this morning is proof to the contrary. Upon this case it stands demonstrated, and I entreat your judgments upon your oaths to say, that whatever fancy or vanity there may have been, her heart was not affected, at all events she did not yield so far as to carry her beyond the line of perfect personal innocence. I imagine, gentlemen, that this is pretty nearly the end of the case, and I might here invoke your judgment and leave it.¹⁸

I do not know whether my learned brother will think it worth his while to comment upon a little evidence, which, however, they introduced, and I cannot therefore pass entirely

¹⁸ Here *Mr. Choate* referred to the exchange of rings and presents to show that those acts were open and unconcealed, and were not evidence against defendant.

unnoticed. Some of it, particularly that of Miss Coburn, may be deserving of our attention; while that of Mary Hunter I maintain to be unworthy of it in the least degree. Upon that they may argue some interest in Sumner. You will scarcely have forgotten that Mary Hunter told you that on the day of the flogging affair, between the time when Porter was beaten and the time when Sumner was brought in to be beaten also, she heard the respondent tell her husband that he was no husband of hers; that he should not be or would not be her husband; that she hoped a dagger or two would be stuck in his heart; and all the rest of that testimony. They gravely produce such trash as that, to show you that she shamelessly avowed to his face that she preferred Sumner to him. I do not believe that if I had passed this over, my learned friend would have said anything about it; but it was introduced, and I suppose was intended to make an impression. To be sure, Mary Hunter is compelled to admit that, on that very night, Dalton, who had heard it all, slept with his wife: and that from that time forward for three weeks he held her upon his own pillow to his heart, which had not yet condemned. You are glad, I apprehend, to remember, gentlemen, that it is established by the series of letters we have laid before you, that he continued to declare his love for her, and his full belief that she reciprocated that love. And yet this woman is brought here to make you believe that under the circumstances that took place that night, she turns round and tells him to his head: You are no husband to me, and Sumner is the man I love.¹⁴

My friend is welcome to the evidence, if he will only make the proper use of it. Have we not seen ten thousand parallel cases, and is not that exactly what we should expect to find; her praying him not to go, presenting to him every induce-

¹⁴ *Mr. Choate* here referred to the testimony of *Adelaide Coburn* on this point, and claimed that the wife's language on that occasion, when she entreated her husband to remain with her, and added "you are no husband of mine if you leave me now," was not inconsistent with a warm affection on her part toward him.

ment not to go, and even adding, in the language of frantic and imprudent imprecation upon him: I hope you will get killed if you go; for God's sake stay with me; stay with me or you are no husband; I hope you will get killed if you go. Is it not a fine touch of human nature in the heart? I submit it to my learned friend, and pray his commentary upon it. And inasmuch as he meets my explanation with a smile, may I be permitted to ask him if it has not been regarded a fine touch and true to nature, in the Roman poet when he drew the Carthaginian queen; when she had been driven even to unsex herself in entreating *Æneas* to remain, and appealed to the memory of that secret meeting in the cave during the storm, when she entreated him by his offspring unborn and by the future of Carthage to stay; and then, when she found him still fixed and determined upon his departure, breaking out before the tempest of her passion and praying that he might perish by the storm and the whirlwind and the flood, without the care of friends or gods, upon the angry sea; and again, when another reaction came, falling back fainting, and carried by her servants to her couch! And do we not find that same fine touch of nature in the mother or the affectionate sister, every day of our lives, when she says to the froward boy, "Stay at home, or I hope you will have your head broke for going out at such a time as this?" That is all there is of it. It is exactly that outbreak of human nature which we constantly witness; and I ask you if this is not ten thousand times more probable than the enormous, foolish and barbarous explanation which Mary Hunter affords of it.

I believe I have now gone over all the evidence upon which the learned counsel have relied here to show how far, to what extent this affection of Mrs. Dalton for Sumner proceeded. I have respectfully submitted to you that it was a light, transient, superficial fancy, and no more; for the very instant she discovered that his designs went further than her virtue and her instincts approved, they were met and repelled. If that be the result of the evidence, of course all this part of the case is at an end. But I am only too happy to call to

your remembrance, that in regard to the whole body of evidence which is laid before you, if you take her entire life as it is brought before you from January, 1855, when their courtship began, until her very last letter in answer to his libel, which terminates the series, you will find it marked by a sweet, passionate and beautiful love for her husband, as an entire little life, one long, true, constant love, never interrupted, never displaced. Once and for a few weeks losing somewhat of its entire control, but recovering it again in a moment and flowing strongly and beautifully as ever. Let me remind you how the evidence stands in relation to that fact, which is of a good deal of importance and authority in appreciating all parts of this case, and may do very much towards determining whether she is yet a wife fit for the arms of Dalton and deserving your favorable verdict. Weighing all the circumstances what do they show us?

She was a child at school when Dalton sought her honorably in marriage. There is no doubt, for Dalton feelingly and strongly so declared, and I think we had other testimony to the same effect, that she was modest, uncommonly so, and to such an extent that, although he met her often, he sought in vain to catch her eye in the street as she walked to and from school. It was only when addressed honorably and openly for marriage, that she yielded him her heart. I submit that it is perfectly clear that Dalton had secured that great thing, a pure and modest young woman's first love. Look at her after life, trace it from the hour of marriage, and you find a uniform concurrence of the evidence in every quarter that she was ever affectionate and fond; that she made his house and his home like another garden of Eden. We have the universal testimony uncontradicted, of everybody everywhere, that she was ever affectionate, ever fond, never away for a moment when she might hope to have the pleasure of his society there, never absent from a meal, never away at the hour of supper, never neglecting a solitary duty of the wife, even to the stitching of a button upon his shirt-collar, but always faithful, always affectionate, always tender. It

will add much to a correct understanding of this part of the case to read Dalton's letters to her from the jail, to see whether he then had anywhere any reason to remind her that she was during those few weeks becoming absent-minded, engrossed, or irritable, or that she was at all changed. Not a word of it. There is not a little of evidence to show it, but everything on the contrary demonstrates that at every moment of time which she could find she devoted to her husband, that all that time she appeared the same, and manifested that unchanged and affectionate tenderness and care; that she was never moody, never gloomy, never apparently thinking of somebody, never apparently sorry to see him; never neglectful of the ten thousand little cares through which the demonstration of love exercises and enjoys itself; never absenting herself but always there, always there through it all. I confess that I attach an importance to all this beyond my own power of language to tell or convey to you, because I put it to your own hearts and your own knowledge of life, if her heart had not been his, could she not have changed during those five or six weeks in her husband's eye? Could she love God and Mammon? Could her heart own two loves at once? No, gentlemen; she would have been changed, she would have been away at his meals, inattentive to his wants, unmoved and unregardful of his care—a changed wife in all. But what is the fact? I submit that it stands entirely demonstrated here, through that whole critical period, upon the testimony of her husband himself, again and again; most fully and unequivocally delivered in his letters from the jail, that she was not changed to him for one hour. This all follows close upon the affair of the Shawmut avenue tragedy; and I entreat your attention that there was no mourning, no tears over Sumner's untimely grave. Was there anything in the three weeks following to show that she did not through all this cling to her old love exactly as before? Did not her husband leave her every morning with a kiss, take her upon his knee, find her there every evening when he came home? A striking evidence how affectionate was their intercourse

is found in the fact that when Mr. Gove, hearing the rumor of this scandal and this misery while in the West, coming home distracted and anxious to see what it was that was threatened, is greeted on his return by that first sight which he sees—the wife sitting still upon her husband's knee. And thus those three weeks passed away. One or two little irritations arose, it is true, because she thought he was a little hasty in requiring her to disown her own beloved sister, but yielding in a moment she throws her arms about him and says: "I yield it all; I will do it if you say so; I don't see the reason of it, but I will do it if you say so." And when once he left her upon a certain Friday, we have the testimony of Mrs. Richardson how distracted she was during that absence, how she wandered almost at midnight to her mother's house to seek an explanation, and to complain and cry out that the Daltons were getting away her husband from her. And then, when she goes to the jail, she is like a light in the jail, that every day when she can drag one foot after the other, in order to give him every possible provision which she could afford, asking him to have his clothes returned, bringing him bouquets to give him pleasure in his cell—pansies "for remembrance," as poor Ophelia says—every hour, every moment, down to the very last, when he goes from the jail and declines to meet her. I take that whole life together, that little rounded life from January, 1855, to January, 1856, and I say that there is not in the history of womanhood, a history of married life, a year more beautiful, true, constant. I ask you, is not a love like this worth having? Is it not the evidence of a good heart, a rich heart, a wealth for him who knows how to cultivate it?

Taking this body of evidence, we find on the other hand as miserable a piece of folly and nonsense as could well happen, weeks of shame afterwards looked upon with abhorrence, weeks of sin as she calls it herself a thousand times over, explaining and asseverating every moment that she was innocent of the great crime; weeks of sin, but no week, hour or moment of illicit love; even if there could have been an

illicit love, one which stopped short, far short, of its final consummation of guilt.¹⁵

I call your attention particularly to one or two of these last letters of Dalton from the jail, because they, in my judgment, put an end to this case. If he, upon all this evidence, believes her to be innocent of adultery, can he stand before the jury to-day and ask you upon the very same evidence to believe her guilty of adultery? Is not he of all human beings the best qualified to judge of the evidence and to judge of its effect? When, therefore, you look upon his letters, and compare them with the evidence in this case, all of it known to him when these letters were written, I shall expect you to use it in his way. In the first place you will say, Dalton had heard every word of this evidence, and if it really and necessarily conducts us to an inference of guilt, it must come to us exaggerated. Was not the husband's ear quick to hear, and the husband's eye quick to see? Would he not know if she had said that which was to strike a dagger into his heart? Did not he hear it, if she ever exclaimed, I love Sumner? Certainly he must have heard it if it had been said. You will say, then, that there is exaggeration in the testimony as reported to you, if it conducts you to a more severe judgment than the husband himself, who, if anybody, could hear and interpret it aright. But there is another view of this evidence of Dalton's, the just and full import of which I pray you to weigh. I have touched upon it again and again, but I cannot tear myself from it. I cannot divest myself of the impression that it disposes of the controversy. It is the circumstance that Dalton of all human beings had the best means of judging of the guilt or innocence of his wife, and that his judgment is conclusive upon ours. Not that you may not find him a poor, silly,

¹⁵ Here *Mr. Choate* read the first letter written by defendant to her husband in jail, indicating her affection for him. He then showed that, with a knowledge of all the facts in the case, except the charge of abortion, which he claimed to be a conspiracy against her, Dalton believed his wife, and continued to love her.

trifling and fond fool, overcome by her blandishments; not but you may be driven to it, in coming to the conclusion that he could not judge whether she was guilty or innocent. But there is not a little of evidence to show that he has not the average and ordinary share of intelligence, or that he is not altogether qualified to judge for himself. Was not the husband, under the nature of the circumstances, the best and the severest of judges? Had not jealousy quickened his apprehension, and even colored his eye against her? Had he not beaten Sumner almost to death for improper familiarities tendered by him and not sufficiently promptly repelled by her? Was he not jealous and suspicious, and therefore exactly in the mood to look upon her with more distrust than your hearts would allow to entertain? And when he came to probe the whole matter to the bottom, what human being so well as Dalton is entitled to belief? When he looks back and sees that modest eye, averted in the street, that coy reluctance to yield her virgin heart, that sweet chastity of her original virgin person, who could know as well as he could know how truly she had loved him always? Who could know as he must have known how to catch her in a lie, how to probe her for the truth, how to come suddenly upon her, how to practice a little deception and take her unawares, how to hang upon her sleep and see what she said when conversing only with her heart and her spirit, without the assistance of her reason and her judgment? Who could tell so well as he how sincere was her repentance, and how that repentance was confined to a mere acknowledgment of imprudence, joined with a protestation of innocence or guilt? Who could read that heart, who try that case, like Dalton? I hope I do not underrate the intelligence of the jury, upon whose intelligence so much is depending; I do not fear the action of the tribunal which for her I have invoked; but, with the profoundest respect for you, gentlemen of the jury, and for the court, I ask what one human being could best investigate the facts and most surely know how to interpret them, could most certainly draw the right deductions from this whole body of

circumstances, if it were not he whom jealousy had exasperated and aroused. He has judged, and he has found her not guilty, upon every particle of evidence in this case but this hideous, incredible, barbarous allegation to which I am coming in a moment.

What changed Dalton when he came out of the jail? I briefly adverted to it yesterday, and may remind you of it again to-day. It was the necessity of his unhappy position. He was on trial for manslaughter, and the penalty threatened to be a severe one. It was necessary that they should be separated; and when they were separated, he fell a victim to the influences which were brought inevitably to bear upon him. You remember the passage in one of his letters, date of December 19, in which he says:

"My dear wife, if the world could understand your case as I do, I should feel happy; but as they do not, we must make the best of it."

There it is; there is his judgment. For myself I have tried you; for myself I approve you; you gave me your virgin heart and person; you should make me the father of my first child; I have appreciated your error; I have investigated its origin, the extent to which it was carried, and I find you the same dear Nellie that won my heart, and would to God that the judgment of the world was as my judgment, would to God that the opinions of the world would enable me to stand before them and avow thus publicly what I assure you is the settled conviction of my heart and judgment. To show you how long this continued, how long and how steadily he held these opinions, I have to call your attention to letters which he wrote towards the close of the time when he was in jail. We heard something about forged letters. It is to be stated for the thorough understanding of these last letters of his, that he had heard of those forged letters, that he had heard from Nellie that they were forgeries, as by law you are bound to take them to have been. You will see that they never altered his sentiment in the slightest degree, nor colored in the least degree the expression of his affection for her. I

shall ask you to take those last letters which he wrote her from the jail; and I entreat you to remember that there is not a line in those letters from beginning to end, there is no intimation that some dark speech had reached his ear and changed his mind. There is an intimation that necessities control him and make it proper for them not to meet quite so openly or immediately as he had anticipated; but there is not a suggestion, from first to last, that down to that hour he had heard a single thing to change his mind—not one. I submit, therefore, that the explanation is entirely in accordance with what I assumed yesterday, that having been compelled by the necessities of his position, as he believes, to live away from her, his mind was perplexed and distracted by the scandal which abused his ear and at last reached and changed his feelings towards her. Now let us see that in these last letters written from the jail, he still loved her, and still promised to meet her, when they could arrange their plans for their future life. The first is dated January 8.¹⁶

We have arrived, in the course of the argument, gentlemen, to the evening of the 25th February. The case of the libelant, if it can be maintained at all, is to be maintained on this, that although down to that night the respondent had continued constant in her assertion of innocence of the great crime, and her husband has implicitly believed it, on that night, not having succeeded in forcing an interview with him at the house of Coburn, she confesses to him that she had been guilty of adultery. Unless this part of the case is established by credible and undoubted testimony to your reasonable conviction, it is certain that there is no case for the libelant. We are brought at once, then, to the examination of that important part of the case. And perhaps I cannot better begin what I have to say in relation to it, than by asking you whether it is at all conceivable, as a matter of probability, that this respondent on that night all at once falls into a

¹⁶ Here *Mr. Choate* read passages from several letters written by Dalton to his wife.

confession of guilt. Down to that hour, remember, her story had been uniform, and repeated, and constant; down to that hour, on her oath, in the pangs of premature childbirth, with tears and attestations to God Almighty, she had declared herself innocent; down to that time her husband had a hundred times said he had believed her to be so. And the allegation on the part of the libelant is, that then and there, under the influence of some incomprehensible motive or another, she suddenly and instantly changes her tone and admits her guilt. I think, gentlemen, that the first thought which would present itself to your mind, with which you should most naturally begin this inquiry, is, whether or not it is at all conceivable, as a matter of probability, on any view of the case, that she could then and there go and confess it. Those of you who believe with me on this survey of the evidence, and on the judgment of the libelant himself, that she was wholly innocent of guilt, will of course reject it as entirely incredible and impossible. But I respectfully submit to those of you who may feel any degree of doubt in regard to the matter, who might still think it in any degree an open question whether she was or was not possibly guilty, although there is no proof of it—I ask you whether you believe it to be possible that then and there she makes the confession? May I ask you, gentlemen, with very great earnestness and confidence, if you can discover a conceivable motive for it? I can very well understand, assuming for a moment the hypothesis of guilt, that although she had down to that hour continued steady and constant in her asseveration of innocence, upon a death-bed, in a moment of anticipated final separation from her husband, wishing to make a clean and clear breast and reveal everything—if she had down to that time kept so perilous a secret as this in her bosom, that she would have declared it.

But how stands the admitted fact; for what purpose is it on the confession of everybody in this case, that she seeks this interview with her husband? Everybody tells you—John H. Coburn tells you, that in that interview she proposes to fly

with him to California, where they can live away and alone. Every particle of evidence in this case, entitled or not entitled to confidence, makes it perfectly clear to a demonstration, that she solicited that interview because, tortured by his extraordinary absenting himself from her since he left jail, she was anxious to make one more effort to win him back. From the hour he left the prison, down to the night of the 25th February, she had expected to see him; down to that time she had been kept from him by influences incomprehensible to herself; down to that time she felt scandal and slander were keeping them apart; that his ear had been abused, and that he only wanted one more assurance from her lips that she had told all the truth, and he would come back to her. For that purpose, the result of all the evidence in this case proves, she seeks him, and then and there—I respectively submit to you in advance—that it is a stupendous moral improbability which nothing can sustain, that on any possible theory of this case she should meet him and fall into a confession of adultery. For what conceivable purpose, I ask you again, on any theory of the case, should she do it? She was dying to live with him; her heart craved him; she must live there or bear no life, and the whole object of the interview, obtained partially, they say, by stratagem—and I dare say it is so, for they did not intend to meet—was to remove any lingering doubt or uncertainty on his mind in regard to her supposed guilt. The very object of it was to overcome any obstacle that scandal and slander had placed between their reunion, and therefore I submit it is provable by no amount of evidence, that meeting him for that purpose, she falls instantly into a confession of guilt. Whether she was guilty or innocent, I submit to you; we know, as men of common intelligence, that she would have continued, then and there, steadfast in her assertion of innocence; was she so great a fool as to think for a moment, that if after so many and such solemn assertions of her innocence she could not win her husband back, a little confession of adultery would do it? If he would not live with her an

innocent woman, would he live with her a guilty woman? If he would not live with her believing her heart to be his and her body to be his, would he live with her after he learned that she had surrendered both to his pollution? I put it to you, in advance, gentlemen, that if an angel from heaven, a being assuming to come in the guise of an angel, should appear before you with such a story as this, it would bring his origin, mission and character into great question with you. Was she afraid at that time of any new revelation? Certainly none at all. The forged letters, if she had heard of them, she declared to be forgeries, and her husband believed it. Sumner was in his grave; the last voice that accused her was hushed in death; and therefore, if down to that hour, fearless of exposure, fearless of detection anywhere, or from any quarter, she had continued steadfast in this assertion of innocence, I submit that every motive that could weigh with the human mind, would have kept her constant in it to the end; and if down to that time, while Sumner was still living, and these letters, if they were not forged, might have been invoked against her and proved to be genuine, she had never faltered in that assertion, and if every motive of fear had gone, and every motive for persistence in her original statement had remained in all its force, I repeat, even upon the testimony of John H. Coburn and Edward O. Coburn, and from all the facts and circumstances in this case, she seeks that interview for the single purpose of disabusing the ear of her husband of this scandal and slander, by which he was kept so mysteriously away from her, and therefore it is not possible, under the ordinary and known laws of human nature, that she should not have persisted in her innocence still. Those of you who believe with me all the evidence in this case as judged by Dalton himself, will declare her innocent; those of you who are in any degree of doubt upon that subject, will also say she is innocent. I have therefore to call your attention directly to the nature of the evidence by which they attempt to overcome our claim of the improbability of this confession.

And this makes it necessary and proper that I should say a word in advance in regard to the nature and danger of this kind of evidence on which they are now relying. It is the evidence of confession, and confessions on the reported words of the speaker. It is very common to say, and it has passed into a maxim of the law, and it is one, I dare say, upon which his honor will give you the results of his own experience in his instructions to the jury, that it is a kind of evidence in all circumstances extremely dangerous, and to be most critically and carefully considered by the jury. The evidence of confession may sometimes be the highest and most satisfactory in a judicial investigation; and, on the other hand, it may be, according to the circumstances of the case, the most worthless by which human rights are ever brought in peril in a court of law.

Gentlemen, if we can feel undoubted confidence that the exact words of the speaker are brought before us as they were uttered; if we can feel undoubted confidence that we have them all in their proper order and according to their sense and meaning as they were spoken; if we can feel undoubted confidence that nothing has been omitted, nothing has been colored, the right collocation has been pursued from first to last, and that the true substantial sense and effect, as it was intended when they were uttered, has been given, we may then with great confidence and certainty proceed to the most solemn of adjudications. But if, on the other hand, there is reason to fear that the words themselves may have been imperfectly heard; if they come reported to us by untrustworthy and unreliable witnesses; if they are testified to by persons under strong temptation to color, to exaggerate, to forget, to drop the appropriate qualifications, to change the order of them as they are spoken; if they come before us under such circumstances as these, gentlemen, there is no weaker or more worthless or more pernicious description of proof on which an intelligent jury are called upon to investigate a case.

I think we need not go further than such a case as this

to indicate the danger of such a species of evidence. Had you not had it proved by the most undoubted testimony in the case, that Mr. Dalton, with apparent sincerity, declared in the country that Mrs. Dalton had confessed to him that she committed the crime of adultery in Fera's saloon. You remember the testimony of William Richardson to this point; and to those of you who know him and his character, and to all of you who have seen and heard him on the stand, I am sure there cannot be a particle of doubt that Dalton made the declaration with apparent sincerity. That he did so is the evidence of Mr. Richardson, under circumstances that give it entire credit in the minds of the jury; that he did so submit made it perfectly clear by the fact that the allegation in the libel charges in terms adultery in Fera's saloon. Dalton then made that declaration—and as I believe that Dalton, with all his faults, all his mistakes (and as much as I pity him, I have to the same extent to censure him), is still an honest, intelligent man—you have it before you that he himself, an honest man than either of these Coburns, a thousand times told, verily believed, and seriously declared that his wife had confessed to his face adultery in Fera's saloon. That you have heard from him. Did she ever make such a confession as this to Dalton? Did she ever say a word to him which, as he understood it, at a time when his mind was fairly and freely under the influence of no sinister motive or biases or cause of disturbance—did she ever make such a declaration as this to him in her life? Gentlemen, let his own conduct answer that question. I had occasion to advert to it yesterday, but it is necessary again to call your attention to it. Dalton himself declared that the confession was made to him about the time of the flogging affair of the 17th November. That it was made then, if it was ever made, there is no matter of controversy or doubt in this case. If any fact is established, it is this one: that from the 14th January until the evening of the 25th February, he never met her at all. This confession of his wife, therefore, thus distinctly and deliberately affirmed by

him to have been made to him, was made on or before or about the 17th November, and within three or four days following that tragedy. Did Dalton at that time understand that to be a confession of guilt in Fera's saloon? Didn't he live with her for the three weeks following as a loving and trusting husband? Didn't he write her letters which have been so much the subject of commentary before you? Is it not, therefore, perfectly clear, as he heard them first when his ear was unabused, and his mind capable of judging, and his memory capable of accurately reporting, that he understood her perfectly? What did he understand her to say then? Just what she has said everywhere, just what she has said a hundred times over in her letters, more forcibly and more strongly everywhere against herself than there—that she had sinned with Sumner; that she had improper intercourse and intimacy with him, and that she had met in the course of that intimacy at Fera's saloon. That was exactly the confession as she made it; that was exactly the manner in which he understood it then, proved by his subsequent, unequivocal acts; and yet afterwards, when he came abroad and began to look back upon it from some time subsequent, when he began to conjecture that public opinion began to proscribe this and proscribe that, when his real or false friends had come to whisper another story in his ear; even then it was, for the first time, that, attempting to recall the conversation and to find in it somewhat to justify him for the course public opinion, not his own convictions, was compelling him to adopt, exceedingly doubtful, perplexed in the extreme, and endeavoring to recall those words, he recalls them as a confession of actual guilt.

I submit that you have there an illustration and a warning that should put you upon your guard from first to last, and if you find such a mind as Dalton's incapable of recalling a confession made to him deliberately and distinctly, and on which he acted for two months, incapable to remember, incapable to repeat—judge you whether or not great caution is not needed in weighing this kind of evidence, when you

appreciate the source from which it comes before us. Always, therefore, gentlemen—and I pray his honor's attention and approbation to the remark—this species of evidence is to be weighed with the utmost degree of care and caution; and I suppose, sir, that I speak the universal language of the books and the universal experience of every lawyer, when I say to you that in the nature of the case no well founded reason to apprehend that the words spoken were equivocal in their nature, that they were meant by the person speaking them in one sense, and yet so uttered that there is danger that they should be taken in another, and when they come before you on the report of witnesses untrustworthy, testifying under strong apparent bias and motive to color and exaggerate, and omit and put them out of their order, it is the weakest and least reliable testimony ever given in a court.

That is true, gentlemen, of this kind of evidence, under all circumstances; but may I not now remind you a little more formally and earnestly, how these confessions all come in.

May I not remind you that every one of them is made by a party believing and admitting herself to be guilty of something, by a party who, under that consciousness of having been guilty to some extent, through sighs and bursting tears, makes confession of that guilt, intending to make no confession of guilt beyond that. Is there not extreme danger that the extent and nature of the confession, which is insisted upon, will be exaggerated and colored when it comes to be reported to you by parties with a disposition and temper to report unfavorably. Helen Dalton did not stand in a position in which she could deny all impropriety and all guilt; on the contrary, her case is—and it has this affecting and this important peculiarity—that she had much wrong to confess, that she had much guilt to own, that she had many temptations to acknowledge, that she had much sin to pray God and her husband to forgive; therefore, when she is making confessions to this extent, is there not danger the most extreme, unless we can place the most undoubted

reliance on the kind of testimony and the character of witnesses by whom it comes to be reported to us, that it will come exaggerated, and misconceived and overrated, perilously and fatally, at the cost of truth?¹⁷

Therefore, you see, even in the interpretation of writing, where the party is making a confession to some extent, there is great danger that we shall interpret those confessions beyond the meaning. And therefore I have to call your attention to that great rule by which not all circumstantial evidence, but in a very extraordinary degree any evidence of confession, is to be judged—that great rule which applies and governs this part of the case, which is that, if the language employed, whether spoken or written, is fairly and reasonably susceptible of a twofold construction, it is the duty of the jury to take it in the milder. It is not at all a matter of feeling, it is not a matter of the heart, it is not a matter of charity, it is not a matter of inclination, but it is a clear rule of the law, that where the language is equivocal, and where circumstances (and her own folly among the rest) have placed the party in a condition in which she must speak in equivocal expression, you are bound everywhere to adopt the milder interpretation; and yet you see that when testimony like that, not resting upon letters, comes to be reported to you by witnesses under strong bias and feeling, to color, exaggerate and overstate, it is all but impossible that it should come before you in form false and distorted.

The first general remark, then, which I have to make to you on this evidence is, that before the law advises a jury to pay the slightest regard to reported verbal confessions, they ought to have the clearest conviction that the witnesses who come here to report it are perfectly cool, unbiased, impartial, fair, just, and under the influence of no motive and no temptation which should induce them to color, exaggerate or distort it. The law makes it, I submit, and I pray the

¹⁷ Here *Mr. Choate* argued that the letters of defendant in evidence contained confession of impropriety and wrong, but not of the great crime charged.

observation of the court upon this, almost an indispensable prerequisite that they should come before you through a source perfectly trustworthy; through witnesses whose character is undoubted and justly unsuspected by the jury, so that they should feel satisfied that they cannot by any possibility have lost or gained by their representation before you. And I submit that we come to the evidence of confessions in this case, evidence of a fact so improbable in itself, by this great uncertainty standing out on the face of it, that there is not a scintilla of testimony of confession against Helen Dalton, but of the confession of that indiscretion and loss of self-respect about which there is no controversy in the case, except from witnesses who are not apparently entitled to the least degree of regard from the jury.

John H. Coburn, who admits here in this case that he attempted to obtain money by written false pretenses of Mr. Gove, a State's prison offense that ought to destroy his testimony in a moment; Edward O. Coburn, who has to admit in the outset of the cause that he is a robber to the amount of seventeen hundred dollars of his father's money, and Mary Hunter, that brawny stranger of whom we know that she is a wet nurse and a mother without a husband—these are the witnesses who come before you. I say nothing of conspiracies or of families, but I do have the honor to say to you for the rights of my client, in regard to evidence so delicate, requiring to be weighed and handled with such accuracy and care, that it is a body of proof which should put it out of the consideration of the jury in a moment. These witnesses to confession cannot so much as bring a written letter of my client to this case without mutilating it as a forger; they cannot carry a letter to her husband without taking a pen and striking out eleven lines of it, and thus change the whole statement into a lie which she has never uttered. Does not that fact stand outside of this case? Was not his honor, a week or a fortnight ago, obliged by the undoubted rules of law to reject a letter offered in evidence by the counsel on the other side, because it appeared

on the evidence addressed to the court that one of the leading witnesses had by mutilation turned the whole letter into a falsehood, and poisoned her own proofs at the very source? Are they witnesses to be trusted with the report of evidence by words? Are they witnesses to remember words where everything may depend upon the exact expression, upon the order of the language, upon dropping an epithet here and inserting an epithet there, by which the guilt of adultery is confessed? Is this a body of witnesses that are to be trusted to report words that are the issues of life with certainty and accuracy? I submit that, on the outside of it, the whole case of confession to be listened to by this jury, is a conclusive and rational distrust which would leave my client in no fear at all of the result. Here is a man that cannot be trusted to carry ten bushels of yellow flat cord across the city for fear that he would steal half of it; who cannot be trusted to take a hat full of uncounted bills to New York. A man who has not honesty enough, or fairness enough, to weigh the hind quarter of an ox—shall he be trusted to weigh out gold dust and dimes, and count the pulses of life? A man not honest enough, a combination not honest enough, to carry a letter without mutilating it into a falsehood, to prove words in which honesty, intelligence and fairness may be entirely omitted!

We come, then, to this examination of confession exactly in this state of the case: It is a probability amounting almost to a miracle, that a confession should be made under any circumstances at all. Confessions themselves are never to be acted upon by the jury unless they know upon their oaths, that they have the very words spoken in the sense in which they came. They never can have that assurance if they have not a clear and undoubting confidence in the speaker that reports them. And their case opens, I say, with this: that a moral miracle is to be established on the testimony of confessions by the evidence of witnesses, as a body, manifestly and apparently, undeserving a moment's confidence.

But, gentlemen, we must go now into this miserable detail a little more fully. My client has been in great danger of being ruined by the evidence of witnesses, every one of whom I submit is worse than the other, and every one of whom is less trustworthy than the other. And it becomes, therefore, my painful duty to ask your attention for a few moments on the evidence to some of these grounds on which the law declares it to be your duty to lay the evidence aside. I hope you know me too well, by this time, gentlemen, at any rate, if not it is too late to make professions about it, to think that I have any pleasure in railing against witnesses; that I expect to gain anything in the least degree by mere sarcasm against witnesses; that I do not recognize in the fullest manner the general presumption of the law that a witness means to speak the truth; that I am not, therefore, bound to show you on this proof that, according to the established and recognized tests by which the credibility of evidence is to be weighed and appreciated, these witnesses are not entitled to confidence.

If I don't go to that extent, do not hear me; if I do not go to that extent, I give my eloquent friend leave to reply that I have brought a mere railing accusation. If I shall show you, according to those standards which the law has provided to discriminate between truth and falsehood, between trustworthiness and untrustworthiness, that these witnesses are not entitled to the full and undoubting confidence of the jury, I then demand of you, on your oaths, gentlemen, that you disbelieve every one of them.

I may be permitted in this same connection to repeat a remark I made yesterday, which is, that somebody or another in this case has perjured himself. It is not a vague, a general charge of perjury, to be made out by me against the other side; it is a call on the jury to choose and say, according to recognized tests of credibility by which the credit of witnesses is to be weighed in a court of law, which of the witnesses they will believe and which they will not believe.

I begin, therefore, with the foundation witness in this case,

John H. Coburn, and I respectfully submit to you, that, tried by every test of credibility which the law recognizes, on your oaths you are bound to disbelieve him. It is not that a laugh can be raised against Coburn or his testimony—that is nothing; it is that, according to those tests which are founded on the longest and widest experience the law deems satisfactory, to show whether a jury can safely believe or not, he is not to be believed. I submit, then, that John H. Coburn is not an honest man, and is not, therefore, entitled to be heard in so delicate a work as bringing every word my client spoke on that evening to her husband; he is not an honest man, and I put it on your solemn oath to you, that there is not a man on that jury who, on the exhibition of John H. Coburn, would entrust him to carry a bundle worth five dollars from this court-house to the depot. There is not a man of you who would take him into your service for any wages or for no wages; there is not a man of you who would have his own life, his own character, his own good name, still less the life of his child or the good name of his child, to rest on the tongue of that witness for a moment. How does he come into this transaction at all? I will tell you exactly. He found out very well that Mr. Gove was extremely exercised on the subject of this attack upon his daughter; he found that this father, alarmed and apprehensive, receiving anonymous letters, his nights made sleepless, his fears becoming his master, was looking for and fearing evidence in every direction; and says Coburn to himself: "I will have something of this; I will make something out of that, or my name's not John H. Coburn, nor John S. Perkins, nor John S. 'Serkins.'" Here he found the tenderest sensibilities of the human heart tortured. I will not call, as my learned friend did the other day, Mr. Gove an "old fool," but he was an old parent tormented by his heart's love, ready in a moment to believe everything, ready to run to the fortune teller, ready to take counsel with dreams when his anodyne would give him a dream to consult. And says he: "I will have a jacket and trowsers out of this

business; I see pantaloons there; I will have a game of billiards and a suit of clothes, or I am nobody." That is the way he comes into the case. He comes and tells Mr. Gove the most treacherous, beastly falsehood by which an exercised, and tender, and apprehensive heart and imagination can be solicited and imposed upon. Says he: "I was in the court-house the other day, very much absorbed in the trial of the cause, and somebody whispered in my ear that one John Simpson saw these people commit adultery out in Brighton." "Now," says he, "I don't think John Simpson will stick to that; I don't know that it is true, but if you will furnish me money enough I will go and find John Simpson, and he can be brought to see whether it is true or not." Every word of that was as black a lie as if it had been uttered by four pirates. He never had heard a word in the court-house about John Simpson; there was no such man as John Simpson; the whole is a pure and sheer coinage of his own bad heart to practice upon this father and furnish himself with the miserable means of a night or two's dissipation in Providence, and a suit of clothes that he had not credit for at a second-hand shop. It is a sheer fabrication—there is no such man as John Simpson on the face of the earth; if there is, now is his time, now is his last time; I call for John Simpson, out of this court or out of this community, to show his head; aye, or any human being that ever heard of him in his life. It would not be extraordinary if, looking over the directories of ten thousand cities, States and kingdoms, you might find such a man; but that John Coburn ever heard of such a name, that the name of such a man was ever reported to him in his life, that he believed for an instant he had any such testimony to give, that it was anything but downright scandal and falsehood—for which, if I was not in a court-house and was not responsible to the law, I should say a horsewhip was the remedy and not the State prison—is preposterous. No such man ever existed. Why do I say this? Does not Coburn come here and say somebody told him about Simpson? Yes; but who

told him? Do we rely on what Coburn heard? Here he is: a little money, and he who agreed to go down and make that report through the telegraph will swear to it just as solemnly as he has done it on the stand. Do you believe him on the stand on his oath, or because you believe the principle of veracity is there? I hope the solemnity of an oath will never be dispensed with. I believe it is not likely to be; but I am bound to regard it as a foolish and idle ceremony if it is taken by a heart and head that does not recognize out of doors the principle of truth. I say once more, that you have no more evidence of the existence of John Simpson than you have that Coburn met him at Providence and was about putting him over the wires when he wanted him for evidence. He lied then for money; he may now lie for malignity and consistency. There is not, therefore a tittle of evidence, and I call on you who are charged with the administration of justice in this case, who should know by this time that our rights are only as our proofs—and that you don't own your house any more than I own it but upon evidence—that you have no right to your life or good name, no right to entertain a belief in the good name of your wife or child in law, but according to the proofs by which the law is administered—I call upon you here and now to say, this man is a rogue, a liar, a forger of false telegraphic communications. A party comes into this case for the purpose of making money by falsehood; therefore he is to be laid entirely out of the consideration of the jury. Do you suppose that anybody whispered to him in the court-house about John Simpson? Next to John Simpson, I should like to see the man who made the whispered communication in the court-house. He hadn't the curiosity to look over his shoulder, so absorbed was he in the proceedings; somebody whispered in his ear, "Simpson saw all this at Brighton," and he never looked over his shoulder to see who it was. I would like to know if he thought he was a man with a "venerable gray beard," whether he was all right about the feet. He should be suspicious of that, I should think—

whether there was nothing cloven anywhere—and to be quite sure whether it was not the suggestion of the devil himself or his own bad heart. Never looked over his shoulder to see the man! If the person who gave that information is within the sound of my voice to-day, let me tell him now is his time, and that he would bring a hundred times more than he was probably ever worth in his life if he would show his head. There never was such a communication; the whole was simply false and you have no doubt of it as it stands before you.

Gentlemen, you have as little pleasure as I have—and I have little pleasure in remarking upon any human being who, upon the responsibility of his oath, has given his testimony. But we are here to defend a great right in a court of law, and upon the proofs it would be a mistake of duty if we did not follow this matter up, and hunt up to the whole extent the character of this witness. I say you do not know whether he tells the truth, because he lied down there; and didn't he lie here, and didn't he come up to the Tremont and the Parker House and book himself with a false name—for a charge which remained unliquidated, for all he knows—and then send down a communication in the name of John Simpson, to bring this poor, credulous, terrified heart to a hotel to be cheated? Is there a man who doubts that he had some scoundrel whom it was intended to pass off to Mr. Gove as this Simpson, who was willing to declare to the falsity of the charge? Didn't he twice by writing declare that Simpson was there, and wasn't it a palpable and repeated lie? And this man to save his head and conscience and sacrifice his heart. He is so malignant a creature that if the mere joke of this exquisite falsehood should bring this father up there, merely to give him the trouble of walking to the hotel and an additional walk upstairs—no, I give John H. Coburn credit for not quite so much malignity as this; and I have reason to suppose that if it was not for a little money to play billiards with and a suit of new clothes, he would hardly go so far as that. Practice a joke under those

circumstances! Is this the character of Coburn? Why, he admitted all this falsehood on the stand in such a winning, ingenious and loving way—that he was a great rouse and liar, and had been everywhere, that we were almost attracted to him. It is, therefore, fit and proper we should know that this winning confession of Coburn on the stand was not quite so voluntary after all, but if it becomes necessary to bring another incident into the trial, he is ready to furnish it.

This Coburn, about six days ago, was attacked by a very bad erysipelas in his ankle. I do not wonder at that; after his five hours' examination on that stand I think he might get it. But he was attacked by a very bad erysipelas in his foot or ankle. In my humble judgment, it was an erysipelas of apprehension about coming into the court-house to testify under the eye of the court and jury. But he was attacked, and accordingly we sent a couple of eminent physicians, Drs. Dana and Durant, up to see what they could do for him, and they put him through a course of warm water or composition powder, or one thing or another, until they cured the erysipelas beyond all doubt, gentlemen. They kill the witness and they cured the patient. So the man came upon the stand, and admitted he sent this communication by telegraph, and the message from the Parker and Tremont. He swore forty times very deliberately that he never wrote one of them—deliberately and repeatedly over and over again, and it was not till my friend, the Doctor here, had turned that screw about a hundred times, with from forty to fifty interrogations, that he was beaten out of one covert into another, from another into another, until at last he was obliged to confess, although he began with most peremptorily denying it altogether, that he sent the telegraph and wrote the forged communication from the Tremont and Parker House.

That deposition has been read to you, gentlemen, and perhaps it may be within your recollection, and I will not take a great deal of time to verify what I have said. I do maintain—and I call upon my brother who was present and who can tell whether what I say is exactly true or not—I call

your attention to the fact, that instead of then and there admitting he recollected it in the prompt manner he did on the stand, he meant to lie it through and deny it, and he did deny again and again in the most deliberate, positive and peremptory terms that he sent the telegraph or sent the messages. And his honor will instruct you—and I ask the court for that instruction—that if you found him then and there intentionally uttering a willful and deliberate falsehood, you will not look at his testimony, you will not weigh it, you will not remember that he has testified in the case. You will throw him out of view and put the merits of the case upon testimony that is credible.¹⁸

Can I, gentlemen of the jury, possibly pursue the detail of such an examination as that? I ask you, as you value your rights, that you instantly, if you take the rule which the court will unquestionably prescribe to you, if the witness has intentionally falsified in any one thing, he is to be taken to be false in all things. He may be innocently mistaken in one case, and yet you may give him credit in another part of the case, but the moment that you find him deliberately falsifying, his opinion is of no consequence, it has no meaning, and he is regularly laid out, and there is an end of him, and the case is thenceforward to go on without him. The only escape for this man is for him to say, that he goes to Providence and telegraphs these falsehoods; comes back to Boston and hires two rooms at different hotels, under false names, causes false letters to be sent under false names, enters his own name falsely—and that transaction had entirely faded from his memory—and therefore he could not recollect it. I say it would be to trifle with the oaths of the jurors, with the administration of the law, the rights of the parties, to give the least degree of credit to such an explanation as that. I submit to you, therefore, there is an end to the witness John H. Coburn, and there is no testimony to that hideous confession which he comes

¹⁸ Here *Mr. Choate* analyzed Coburn's testimony in detail to show that he was unworthy of belief.

here to report—none whatever. It is not sworn to, there was no confession to the judgment of the jury under the subtle rules of law. Do you not all see that in the course of this argument I have carefully avoided all mere professional raillery at the witness? I am bringing him up to the golden tests and standards by which the law weighs proof, or the assayer weighs gold. I am helping you to see him by the light of the rule of law, and I cannot allow you for a moment to suppose that I am indulging in a professional habit of abusing witnesses when I am simply declaring to you—with all truth and soberness, under my responsibility to my profession and my oath of office, and with the sanction of this bench—the great rule of law by which the credibility of evidence is to be passed on; and I declare the law to be, if you find a witness to have sworn deliberately, to a falsehood, knowing and believing it to be a falsehood, that he is no longer a witness, and on this ground I submit that the testimony of John H. Coburn is not to engage your attention for a moment. There is a great deal of commentary that might be made on this, a great deal tending to show the utter incredibility of the witness to the jury, with which I will not detain you. He is laid out, and is to be viewed as a discarded, false and perjured witness.

There is one answer to this man's testimony, which puts an end to him on this case, and I submit that we gain on the merits of our own case by this commenting on the worthlessness of the evidence offered by the libellant, and I answer this story that the conduct of Dalton that night, as we have it revealed to us by credible testimony in this case, gives this story to the hissing and contempt which it deserves from every intelligent man.

I ask you to look at the conduct of Dalton; take the unquestionable circumstances, then all the positive testimony; take the beautiful letter in which the next morning she breathed out her expectation of that new life of promise resulting from the interview, and I ask if you believe for one single moment that such a hideous communication was

made. Remember that down to that time, even after Dalton left the jail, he declared that he believed she was innocent, that he loved and trusted her, and wished to God that he could trust her completely. Remember that down to that night, on her oath, with her hand on the Bible, and in the pains of the threatened miscarriage, she had declared herself to be innocent; and remember, that she then comes into his presence to play her last card for his heart, and then, according to this man's testimony, makes such a confession. I put it to you that, exasperated as Dalton was, hoping, yet fearing, manifestly determined to fly at once, if the evidence of her guilt should come from her lips, would he not have started from his feet at such a declaration, and cried, "Oh! ruin! ruin!" and fled from the door?

You are soon to be appealed to to give a divorce, because those sensibilities which are respected and which are to be religiously cared for, these susceptibilities of the husband have been outraged.

Try him, then, as a husband; try him on the supposition that he has those sensibilities and feels them keenly, and then give him credit for this character. I have to ask you, if one man of you doubts, on hearing such a communication from his wife, he would have exclaimed: "May God forgive you, I cannot! All is over now!" and have left her forever. There is not a husband on the panel that would not have done it; nor a husband who recognizes the marriage tie on the face of the earth who would not have done it. Yet does John H. Coburn hear him utter one word? Not one. He seems very desirous of knowing what Fanny has been doing. But is that all? No, gentlemen. By all the admitted testimony of this case coming to us by the witnesses for the libellant, and therefore open to no criticism from them, the doors are softly drawn to and locked, and there they are for two hours and a half—there they would have been till daylight if this same John H. Coburn had not knocked at the door and said it was nine o'clock, and asked them if they were aware of the lateness of the hour. What was he

doing there? How is the confession just then made for the first time? What has become of that? I submit that it is too clear for a moment's controversy, that the conversation began with the door open, and was the free, full, heart-breaking revelation of actual wrong, and an asseveration of actual innocence; that it was full of sorrow, grief and earnest pathos on her part; that she at last caused him to believe the truth, and then the door was closed, and then and there she gave her love to her husband. I have adverted to this more than once. You may take it as coming from my client, or on my suggestion, as you please. In that sweet recognition they spent two hours, two hours and a half. He was satisfied that there had been nothing but imprudence, and no guilt; and in that sweet moment of reconciliation, after an absence of two months—do not be quite sure that he did not then and there give her all that a husband can; whether he did so or not, it is entirely immaterial to my argument, which is, that his conduct was utterly and instantly a decisive refutation of Coburn's story about the confession. I go further, and show you, by a body of positive and circumstantial evidence, that they there made a provisional arrangement for their troubled and yet possible future. They fell into an arrangement, and although he could not live with her openly until the sentence was imposed, yet he was entirely ready to do everything for his wife, and then and there commenced arrangements for their troubled future; and I submit it to you, it was agreed that they should meet the next Thursday night to mature their arrangements, when they should lay out a scheme of life for the future.

Remember, in the next place, that Edward O. Coburn admitted, that when they were going home, that she said she felt better now—not because she had made a clean breast of guilt, but because she expected to meet him the next Thursday night.

The next piece of evidence is that mutilated letter; that eloquent orator, that truthful and decisive witness—the mutilated letter. They bring it and offer it as a letter written

by her the next morning after the transaction, and they do not dare lay it before you without first erasing eleven lines, which, though incapable of being fully read, clearly show that this poor thing was then and there making provision for every contingency of this meeting on the next Thursday night. They found that she was making too strong a point of it, in taking too much pains that nothing should prevent the meeting, and so they struck out a portion of it. I submit that you take a microscope of a hundred horse power, and you will find a meaning in the erasure, and will see that it is a clear recognition of the arrangement for the proposed meeting; and if you cannot find it in this way, I think you will do so by your reason.¹⁹

This Mr. Coburn began to find after a time that his excuse of standing at a window would not quite answer the purpose, and he began to think, under my brother Durant's cross-examination, that, as the excuse of standing at the window might perhaps be sufficiently explained and deemed to be adequate, it would be well for him to volunteer to add to that excuse that she had been taking a little cake and wine, and probably that was the reason. Mark the hypocritical malignity of that testimony. He had stated before that she had been surprised in an unexpected position, and that she resisted the moment she found she was surprised. He perceived that that was a perfect defense everywhere; he therefore thought he would give her a treat of a little cake and wine of his own. It was the cake, the wine, the champagne, which was to account for it; he had not said a word about taking cake, or wine, or champagne—not a word; the whole

¹⁹ Here *Mr. Choate* showed from the evidence and *Mrs. Dalton's* letters to her husband, that at their meeting, after she had told him everything, he promised to live with her, and was prevented by his family from doing so. That the alleged confessions, even if true, revealed no crime, but the evidence, on the contrary, disclosed that plaintiff after all believed his wife innocent. He next reviewed the testimony of *Edward O. Coburn* and *Mary Hunter* at great length, to show, first, that it was false, and, second, that, even if any part of it were true, it failed to establish the confession of adultery sought to be proved by plaintiff.

of it was a sudden, extemporaneous, hypocritical, malignant invention of the witness to color, change, qualify and turn to falsehood his whole story upon the stand, which had attributed to her the excuse of being surprised at the looking out of a window, resisting in a moment, her virtue never yielding. He says to himself: "That is a complete and perfect defense, but if she were to be brought under the influence of a stimulant, wine or champagne, she might have yielded to that surprise;" and so he finds his occasion, and treats her at his own expense, as it costs him nothing—to cake and wine and champagne upon the stand. I submit to you, gentlemen, whether it was not as sheer, as malignant, as hypocritical a falsehood as has occurred in the testimony of any witness in this whole case. I am inclined to think that Mary Hunter's story came rather suddenly across his memory, and so he volunteered it, although he was compelled to admit that she had herself said not a single syllable about it.

I put it to you again, gentlemen, with great earnestness, that if the testimony of this witness was entirely trustworthy, making reasonable allowance for the difficulty of reporting language, the state of the case which he makes out against her is no more than can be made out against any young daughter of Boston, pure as the flakes of snow when it falls, standing at the Athenæum and looking out upon a graveyard, upon whom an intoxicated rowdy should suddenly break in and allow his hand to stray lasciviously upon her bosom, from whom instantly she turns, shrieks, bursts into tears and falls hysterically—not a particle, and that is the state of testimony before you. Is there anything in the evidence of John H. Coburn which in the least degree resembles it? He places it at a time when she is conducting an earnest exposition to a complaint of her husband—at a time when she is making an argument to show that she is entitled to have him back again; and I therefore put it to you as beyond a particle of doubt, that she means so to conduct that argument as to make out a case. Of the two Coburns at confes-

sion give me John H. Coburn, for he gets up something which nobody believes. The principles of the two Coburns remind me of Pope's classification:

"John struts, a perjurer, open, bold and brave.
Ned sneaks, a liar, an exceeding knave."

That is the difference between them exactly. Is Edward O. Coburn entitled in the least degree to the credit of the jury? Need I say anything more than to ask you whether Edward O. Coburn is an honest man and fit to be trusted upon a question of this importance—affecting life, or character, or good fame?²⁰

There is a general public rumor current in this community that a thief is not an honest man, and Edward O. Coburn is a thief. He was obliged to admit under your eye, that he took false or true keys, broke into his father's safe, and took all there was. Of the amount he was not certain, but it was about \$1,700. He went away and denied it—that is to be a thief, and to be a thief is not to be an honest man. He who would steal his father-in-law's money is not to be believed when he gives testimony against his sister-in-law, the child of the father-in-law. He is not an honest man. You heard the explanation that he attempted to give here, and the malignity and intellectual hypocrisy by which that explanation was marked. He was called upon to admit the fact, and he did so. He was called upon for his reasons, and he said that in consequence of his irregularities he had contracted debts, which he wanted to pay. He wanted a little money and as some defense of himself against this charge he said it was under the influences of certain wild ideas; that the memory of this affair had done him great injury. When he was asked how much money he wanted to pay his

²⁰ Here *Mr. Choate* referred to the fact that credit was claimed for Edward O. Coburn, because he wanted to run away and not testify. He branded him as a hypocrite, and showed that he did not wish to be questioned about robbing his father-in-law's safe as the reason why he desired to absent himself.

debts, he said he did not know, but he took all there was; and then he went away and denied that he had taken a dollar. And yet to put himself upon this jury—I care nothing about his defense—as entitled to some confidence from the jury, he undertakes to account for taking this money by certain wild ideas. How contemptible a hypocrisy is this! I can very well understand, from what I have read and what I have discovered, that a husband suddenly made aware or made to believe in his wife's guilt, and made jealous by it, might be urged in the tempest to the murder of the adulterer, or to the murder of the adulteress, and the digging of his own grave. That I can understand, for it is altogether a new mode which he seems to have taken of solacing his grief—that of stealing by means of false keys. It has generally been considered a great stroke of nature in the poet, where he represents Othello—when those billows were raging and those storms blowing in that great bosom—as going to the bed, kissing his wife, and then stifling her to death; and after that comes the superb speech beginning,

Soft now, a word or two before we part,

and he kills himself. But what should we think of Shakespeare, to adopt Mary Hunter's expression, if he had represented Othello as "blowing off a little," in the first place, by stealing seventeen or eighteen hundred dollars of his father's money? It is hypocrisy, gentlemen, and no truth, no manhood. I submit that the witness is not entitled to the confidence and credit of this jury.²¹

This man comes here to report words and confession when he cannot carry a letter from one house to another without sitting down and forging it into a falsehood. He stands here, let me say, in the judgment of this court on the evidence in this position. He receives a letter from the respondent which he agrees to carry to her husband, that letter which was filled up with new life and new hopes—a new

²¹ Here *Mr. Choate* went on at great length to show that the witness testified falsely from malignant motives.

and a dear husband to live for, a future opening before her, a happy meeting next Thursday which she is anxious by all possible attentions to secure to herself—and he cannot bring it before the court without having first elaborately erased from it every word which goes to show an arrangement for such a meeting as that. I repeat that such a man who has not honesty and fairness enough to keep his hands from forgery, is not entitled to bring in words.

There is that beautiful letter, not a word of confession in it; there it is with a key at the end, opening all its sense, and he broke in and stole the key—*stole the key*; not this time a key for the robbery of his father's store, but for the destruction of the daughter's proofs. I pray your judgment, gentlemen, that this is the end of Edward O. Coburn.

From John H. Coburn and Edward O. Coburn to Mary Hunter, whether ascending or descending, is easy—with or without the Latin maxim on that subject. I believe if you leave the two Coburns out of the case, you will not be troubled by Mary Hunter. I submit that her testimony was mixed for her exactly as a man mixes rum and water to drink, and she drank it. In that bronze, strange woman, what do we behold? From her appearance and her account of herself upon the stand, what do we know that would warrant us to give credit to what she swears to for a moment? Where she came from, with whom she has lived, what has been her way of life, who is the father of her child, to every question which my brother Durant puts under the settled practice of the court, the only means by which perjury of an unknown stranger can be detected—to all these she answers, with her arms akimbo, "It is none of your business." I submit to you, gentlemen, that the inference is inevitable, if she could truly and properly answer those questions on her oath, a chaste, well ordered life and conversation, she would have leaped to do it. She would have rejoiced at the opportunity; my learned brother would have instructed her, it would have been his duty to so instruct her to take her earliest opportunity to tell her history, per-

haps a humble one; and I submit to you that no other inference can be made from her reiterated refusal to tell us anything about herself, than that she knows perfectly well that it is one of those rare cases, but which sometimes happen, where "the least said is soonest mended;" and therefore she tells us, "it is none of your business," and that is the end. Is that a ground for railing at the witness? No; but it is a ground for saying that we do not know whether that woman knows anything, or respects in the least degree the sanctity of an oath. We have not a particle of evidence that that foreigner and stranger ever had a lesson from the Bible in her life, that she ever heard a word of counsel from priest or minister, that she ever heard a mass "by bell, book or candle," that she ever saw a domestic example of purity, that she remembers a father or mother, that she had ever received one single lesson or one single influence which enables us to believe that she, here and now, feels the obligation of an oath. That she is a foreigner is nothing against her; that, being a foreigner, we should naturally inquire something about her antecedents, was not strange, but it was nothing against her; and if then and there she had frankly disclosed them to us, we might have found her entitled to belief. But she buries herself up, she refuses to tell you anything; and I repeat that you do not know whether from her childhood to this hour she ever had a lesson of virtue from anybody, ever came to understand the importance of truthfulness, the virtue of chastity and the value of character and reputation.

She stands before you here and now, gentlemen, only as a wet nurse and mother, without a husband, whom she will not confess, and it is for you to say, if standing on her alone, if the cause rests on her alone, whether or not she is entitled in the least degree to credit by this jury. The matter and manner of her testimony may be briefly adverted to, and with that I complete all I have to say with regard to her.²²

²² Here *Mr. Choate* showed that her evidence about purchasing *savin, &c.*, was unworthy of belief, and wholly uncorroborated.

I need not, in the view I have been taking of this case, call your attention to one fact. I apprehend it has already been anticipated and long since disposed of. That on reading this entire series of letters, you will find, everywhere, from first to last, perhaps strongest in the first, certainly no stronger in the last, continual and reiterated expressions of remorse and regret, and grief by Helen Dalton for what she had done. I do not believe my learned brother, upon a collation of that series of letters, will stand up here and contend for a moment, and say, that she ever dreamed of supposing for a moment, she meant to confess by any strong expression, that she had committed the crime of adultery; but, on the contrary, I hold it to be one of the best points in this case for that young wife, I hold it to be a satisfactory evidence, that there is yet a heart and character worth cultivating and saving, that there is yet a wife whom Dalton might be proud and happy to take again to his bed, that no strength of language seems to herself sufficient to express her own remorse and shame for what she has done. She knew when she penned every one of those letters, she knew perfectly well, from her conversation with her husband and the Daltons on the Sunday evening after the Shawmut avenue tragedy, that he understood perfectly well that all her strong expressions, all her tears, all her prayers to Almighty God to forgive her for her sin, all her regret that she had failed to make him happy, and failed to be worthy of him, were only the confessions of a pure and a chaste heart, that judged itself more harshly than God in his infinite mercy will surely judge it, more harshly than the generous and manly heart could judge it. As she looked back to that time, no language seemed too strong, no compunction seemed too severe, no prayer to God seemed too profound, no promise of a better life too warm, too strong, too heartfelt, to express it all. And now I say, for my learned brother to cull out a single one of that series, and put it forward without its context, by itself, and call on you to interpret it as no letter ought to be interpreted, out of its connection, without

the *usus loquendi* of the parties themselves, who perfectly understood it, and without which it could not be appreciated—to do that would be a cruelty tremendous, an injustice from which I think he would shrink back. No, gentlemen, you will take this series from first to last, and I will take my chance of a verdict, or disagreement, as you shall find, that the strongest and clearest expressions of compunction, grief, guilt, and sin, shall be found at the beginning of the series. After he had seen them, and studied them, and understood them perfectly well, he writes her again and again that he truly loves her, looks to a happier life yet with the loved one, the trusted one. I might read a sentence or two, but one is enough, for she had clearly and distinctly put him in possession of her mind on this point. I submit that the purer she was, the more confident she felt that her body had been preserved as a vessel of honor for her husband, at the same time, the more distinctly and clearly she appreciated the deep wrong she had actually done. I submit that it is according to the nature of love that she shall even overstate, she shall exaggerate, shall make more of it than it deserves, even of that miserable flirtation which did not end in adultery. It is to lay herself at his feet; it is to show how wholly she feels with him; it is to assure him of her whole heart laid bare, her whole soul probed to the bottom; and, therefore, it is that you shall find here exaggerated expressions, which, unless you know perfectly well, as the correspondents themselves must have known, their true signification. I apprehend under the rule of law they must be subject to the mildest interpretation which can be put upon them. Here you have the key to the whole, and thank God, they have not stolen this bar if they have stolen the others. “God knows I love you, darling, forgive that vein of folly, although I have sinned—yet not criminal;” that is the key; that is the interpretation of the language. And thenceforward it is perfectly understood between the parties that when she says she has sinned, that she has been wicked, that she has been tempted, that the tempter is in his grave,

and she is sorry he had not been there before he presented the temptation; it is all perfectly understood between them from beginning to end. It is the most dreadful cruelty and injustice here and now to desert that perfect understanding; that what she meant was: "I have been sinful by my vanity; I have been secretly tempted by the influence of this young man now in his grave, and I have so far done you a wrong which I shall acknowledge for sin, and pray God while life lasts to forgive me for, but not crime, dear Frank, not crime"—the whole course of the correspondence perfectly understood by them—and to read half-a-dozen extracts from those letters, to show much more strength of affection and a sin which he can never forgive. It is hardly necessary to illustrate my proposition with regard to the meaning of language, the *usus loquendi* of the parties in the interpretation of a writing.

"Frank, you know and God knows that when I married you I was as pure as a child could be, and I am now. If you do not know it, your folks know it. Father will not allow his daughter, if she has committed a wrong thing, which no one upholds her in, to be treated thus. Darling Frank, pray our heavenly Father to forgive me my sins, and let us also feel that in a great degree he has. Frank, when you pray, pray that God will forgive your erring wife. I never expect to have anyone love me, I have been so naughty; but then I know Frank will love me, if no one else, won't you, darling?"

After that he writes to her again and again and again: "My own sweet Nelly, my darling, I fly to your arms; we shall be happy yet. Courage; trust your own affectionate husband." Then, gentlemen, I submit that the selection of a single paragraph from such a letter as the last, written manifestly under the impression of the great joy the communication of the day before in its results had given her, will not be pursued, or if pursued, will be ineffectual with a candid jury.

I therefore, gentlemen, bring this argument to a close. Positive evidence on behalf of the respondent from the nature of the case we cannot bring. Sumner is in his grave; we

cannot bring him. We could not bring in evidence of his declarations, but in that silence we have these two persuasive tests: the testimony of a dying man to his innocence—testimony on that solemn occasion when men and women speak the truth if they ever speak it; and the testimony of Helen Dalton, who declared herself innocent of this crime; once when her husband, who knew that she was to be trusted, who knew that he could entitle himself to have the joy of belief in her, proposed to her to sink down upon her knees upon the family Bible, and call upon her heavenly Father to witness whether she spoke the truth, upon which oath propounded by her she declared herself to be innocent; and over again, when the pains of premature delivery came upon her, when, therefore, she was in the very danger and peril of death, in that state where, according to a statute of law in this commonwealth, a certain artificial credit is always to be given to the oath of a witness declaring her innocence then. We submit the proof that from the testimony in this case, she has been uniformly and steadily constant in that declaration.

The charge of abortion by which they poisoned your own minds for a time and the public mind for a time, is wholly false, and wholly disproved. There is no question whatever about this. The testimony of these Coburns and Mary Hunter, all three, will not weigh a feather for a moment in your minds. And then upon everything else, from one end of the case to the other, every particle of credible testimony, you have the deliberate judgment of the best witnesses on our side.

I leave her case, therefore, upon this statement, and respectfully submit that for both their sakes you will render a verdict promptly and joyfully in favor of Helen Dalton—for both their sakes. There is a future for them both together, gentlemen, I think; but if that be not so—if it be that this matter has proceeded so far that her husband's affections have been alienated, and that a happy life in her case has become impracticable, yet for all that, let there be

no divorce. For no levity, no vanity, no indiscretion, let there be a divorce. I bring to your minds the words of Him who spake as never man spake, "Whosoever putteth away his wife"—for vanity, for coquetry, for levity, for flirtation?—whosoever putteth away his wife for anything short of adultery, intentionally, willingly indulged, and that established by clear, undoubted and credible proof—whosoever does it, "causeth her to commit adultery." If they may not be dismissed then, gentlemen, to live again together, for her sake and her parents' sustain her; give her back to self respect, and the assistance of that public opinion which all of us require.

There was a time in the progress of this cause when that father unaware of what might be produced against her, or by what instruments of defense it would be necessary here to protect his daughter's honor, set on foot an inquiry of recrimination to be instituted against the libelant. Information was brought to his ears on which he directed a certain inquiry; the result was communicated to counsel and that result has been stated on the files of the court. On that allegation of recrimination we have had occasion to produce no evidence; it was contrary, as Mr. Gove has sworn, to the wishes of his daughter from first to last that the attempt should be made at all. There is therefore by her request—and it is gratifying to the counsel in that respect to be able to indulge that request—not a tittle of evidence upon which it can ever be predicated that he was guilty; as to that he must be found to be innocent. Permit me to say that she would have thought it the last drop in this bitterest cup if her own frivolities and vanities had done anything to tempt or even to bring into suspicion the chastity of her husband. It would have been the bitterest drop in her cup. She would say by me, as she said to him in her last letter, to Frank: "You have done all you can to disgrace me, but no matter now,—I will not blame you: You are my husband for the present; I will not talk against you nor say aught that can make you unhappy. Wishing you much happiness and peace

with much love, if you will accept it, I remain, your wife." So may she remain until that one of them to whom it is appointed first to die shall find the peace of the grave.

I thank you for your kind indulgence and leave the case in your hands.

MR. DANA FOR THE LIBELANT.

Mr. Dana. Gentlemen: The mind hath its anchor as the soul hath; and if, as the scriptures say, Hope is the anchor of the soul, the mind's anchor is Reason. If it were not so, gentlemen, we should be blown about by every wind of doctrine; we should be clouds holding no water; we should be at the disposition of the strongest, the most eloquent, and the most subtle. Proceedings at law, with whatever formalities they may be surrounded, would turn the court room into nothing else than an arena where the race would be to the swift and the battle to the strong. The verdict would be given to the most eloquent, and the judgment to the most powerful. This would be a circus, an arena, a struggle for the crown and the chaplet. Now, gentlemen, if I believed that to be the case, do you suppose I should do so preposterous a thing as to stand before you and before this audience to contend for the palm for a moment? We have listened here for two days to the eloquence of the head of the American bar, the orator upon whose brows we all unite in placing the chaplet forensic victory, to whom we build monuments while we live, with our praises, and those who may be so unfortunate as to survive him will build him monuments, the workingman of marble, the poet and the orator a monument *ære perennius*.

But, gentlemen, we come before you today in the faith that this is not an arena, where the race is to the swift and the battle to the strong, where the verdict is to go according to the amount of intellectual power and eloquence brought to bear upon the case. We come before you in the confidence that here are 12 men, sworn to look at certain facts,

certain circumstances, and to determine upon them in a given issue, who are to judge upon your oaths, who are to stand anchored to your own reason, and to give an account to your own understandings and your own consciences. I do not deny for myself, nor for my client, that we have approached this jury trial from the beginning with apprehension. Still less would I deny that I approach the argument of the case this morning with apprehension; because I suppose that last night, when the words of the eloquent counsel were dying away upon our ears, that beautiful dying close, I make take it for granted that every man upon your panel had made up his mind to render a verdict for Mrs. Dalton. I should be astonished if it were not so. The learned counsel would have had far less than his usual success, if it were not so. But we approached it with diffidence from the beginning. I trust I never flatter one man for his judgment; I will not flatter 12 men for their verdict. I do not believe, nor do any of you believe, that a jury is the best tribunal before which to try a question of adultery between a man and wife, before a public audience, a public press, and excited public interests. It is an experiment. Neither do I agree with the learned counsel, that what has been presented here for the last 14 days is good, wholesome daily food for the community, for young men and young women. I believe that fathers rise earlier in their families, to hide away their newspapers, that their sons and daughters may not read them. I believe that in the trial of the secrets between husband and wife, and their correspondence, it is far better to leave this to tribunals that can take these letters and read them alone, than to have them exposed to be read before 12 men, judge and counsel, for all to hear, and every newspaper in the land to report. Does a man know that every letter he may have written to his wife, or which his wife may have written to him, containing whatever dreadful secrets, although they may not be disgraceful, is liable to be read in public, and telegraphed to every part of America? Is that judicious? This is an experiment. I believe it is the first

jury trial in a case of adultery that has taken place in this free State.

JUDGE MERRICK stated that it was not the first.

Mr. Dana: If not the first, at least nearly so, and it may be the last. It is an experiment. There are dangers attending it. We are not to flatter one another; we have a higher duty to perform—there are dangers attending it, and we do not deny them. Jurors are but men. I own myself, with all the strong interest I feel in my client, Mr. Dalton, with all the entire and undoubting confidence I feel in the absolute truth and justice of his case, I own myself that when I listened to the eloquence which has filled this hall for the last two days, it required some self control to prevent myself from being carried away from the moorings of my own judgment; and I can conceive that my friend, Mr. Dalton, for after an acquaintance of two years I am glad to call him my friend as well as client, may have felt a little as Warren Hastings did upon his trial, in listening to the eloquence of Burke at the close of his impeachment, when he said, "For half an hour I gazed up at the orator in a reverie of wonder, and so long a time felt myself the most guilty man on earth."

There is another difficulty attending it. The publicity which necessarily follows these proceedings enlists the press. That is inevitable. They take sides. That is not inevitable, but they do. The community read, and they read a part. They read from one paper, or part of a paper, or a letter, and they get an impression. Those impressions circulate, and they necessarily reach you. It is in vain to expect that they should not reach you. My friend and client, Mr. Dalton, has no means or appliances for enlisting the press. He has no strong political, personal, or religious influences. He cannot bring the sympathy which attends a young woman in her trials, and therefore he is at a disadvantage. Then, besides that, I know that the sympathy of twelve gentlemen in these suits will go with the woman and not with the man. It is honorable to you that it should be so. Do not be ashamed

of that sympathy, but do not be governed by it. Do not let it be said,—for I am as anxious as any man that this experiment of a jury trial may succeed if it is right, do not let it be said when a husband comes into court, a few tears from a woman, the eloquent breath of an orator, and it is all over.

On the 11th day of June, 1855, Mr. Dalton gave his plighted faith in marriage to Helen Maria Gove. On that day he promised to sustain and love and cherish her, in good report and in evil report; and he did it long. He promised, forsaking all others, to keep himself unto her only, and he has done it. He has done it to this hour, and he defies malice, hatred, revenge, policy, subtlety, anything, whether from his own family, whether from his own father-in-law, or whom it may be, he defies them all to produce one witness. He defies them to produce one lewd woman even, ready to swear under any mistake almost, to say that his shadow ever crossed the portal of any house except for a lawful purpose. Let them extend that inquiry to the shambles of every dancing brothel, and employ the "respectable" door-keeper of a dancing brothel to haunt him day and night, to watch his goings out and his comings in, his risings up and his lyings down. He defies them all. He has kept his promise faithfully and well.

Upon that day she made a contract, which she was of competent age to make. She made the contract that, forsaking all others, she would keep herself unto him only. If she has not kept that contract, the contract is to be dissolved. This is the whole of it, and His Honor will say to you that that is the whole of it.

It is not a question of guilt. She is not to be tried as a criminal. The question is whether the marriage contract has been kept in that particular, for if it has not, then the marriage contract is to be dissolved. That is the law. Whether a person shall be tried criminally for an act of adultery is another question. Mr. Foreman, if a man has promised to you that he will keep a precious jewel, or a sum of money, if he has undertaken to carry it and account for it, then if it is gone,

he is to make you compensation. It is no matter whether he lost it in his shop, whether in a sudden moment of temptation he yields to the tempter; it is no matter what the excuse may be, you say to him, "I do love thee, but no more be officer of mine." But then if he were brought to the bar as a criminal, upon a trial for theft, there is a very different question which arises. He may have lost it by carelessness, by an accident, however constant he may have been in his virtue. But with regard to the marriage contract, the law even goes so far as to say, as the Courts have recently decided in Pennsylvania, that if a woman submits her person to the embraces of a stranger, even in a paroxysm of insanity, the marriage contract is to be dissolved. The question is not as to the degree of moral guilt. In Heaven's chancery that can be weighed. In public opinion that can not be weighed, because "What's done we partly can compute; we know not what is resisted." But the husband has a right. He is not bound to such a connection, no matter with what motive the error occurred, though under a mistake; for he cannot be certain of the legitimacy of the offspring. He cannot know whether the child born after that is his. His family cannot know it; this community cannot know it; the law cannot know it. It may seem very hard. It may be cruel in the husband to refuse to take her back; but that is *in foro conscientie*; in the law he is not obliged to do it. Therefore I beg you to clear from your minds all idea that Mrs. Helen M. Dalton stands here to-day charged as a criminal. We stand here to-day to try a question of a civil contract; and that is the whole of it. We stand here to-day to determine whether a civil contract has been kept or broken, and that is the whole of it.

Nor is it to be tried by the rule which fell from the lips of the learned counsel and perhaps did not attract the attention of the Court at the moment, that she must be proved to be guilty beyond all reasonable doubt. That, as his Honor will say to you, is not the rule which governs civil cases.

Mr. Choate: It is expressly held that in that respect these are distinguished from civil causes, that the proof is to be established beyond a reasonable doubt.

Mr. Dana: That is "monkish," is it not? What the monks have to say about that I do not know. "Ecclesiastical courts," "black doctors," we do not know about them.

Mr. Choate: I will hand in my authorities to the Court by and by.

Mr. Dana: His Honor will decide the question. We do not lay down the law; we receive it. By whatever burden of proof we come to try the question, the question itself remains whether this civil contract has been kept or broken. My friend Mr. Dalton says that the contract he entered into, and which he has kept and performed, she has not kept and performed, and that is the question you are to try.

Well, gentlemen, who is the libelant who comes before you? —Mr. Dalton. Some evidence has come out on this trial, by which you can form an opinion of him, and see who and what he is. I do not know that it has appeared before you, that his father was a citizen of Portland, Maine, but he has resided here many years, and he is a member of a family which has escaped with great fortune, any attack from the lips of the counsel for the respondent. There is not a kinder heart in the world than that of the learned and eloquent orator who pleads for the respondent; there is not a kinder heart in the world, he would not say a word against any human being, but he must perform his duty; and if, in the line of his duty, it is thought necessary, and if the evidence warrants the saying of anything against party or witness, he will say it; and therefore he will perfectly understand me, when I say, that I do not attribute their exemption to his kindness, which he has no right to bring into this case, but to the character of the parties themselves.

Mr. Dalton was brought up in that domestic circle, refined, delicate, well educated, high principled, high toned family, without a spot or touch of disgrace upon their ermine, forming a happy, though widowed and fatherless family circle. People who read, and read well, people who think, and think

well, people who are attached to each other with a reasonable attachment, and are interested in one another's honor and good name. So, and thus, gentlemen, he was educated. I wish to see the person living, except it be his father-in-law or his wife, who has ventured to cast a reproach upon the character of Frank Dalton. You know, gentlemen, that for about eight years he was in the employment of Manning, Glover & Co., of this city, whom we all know to be very respectable merchants; he received his mercantile education there, and though only of the age of two and twenty at the time of his marriage he was receiving a salary of \$2,500 as their salesman. He is young, he has lived but few years; and during the last two years he has lived under a cloud; but gentlemen, he has some friends, and the charitable fact is that his friends are those who know him; the public have not been his friends, but every man who knows him is his friend. I do not know, gentlemen, that when he approached this jury trial, he found the countenance of one personal friend upon that jury; I hope he has made no enemies; I hope he has made some friends since he has sat here in these anxious days. Gentlemen, if there is "an art to read the mind's construction in the face," exercise it! Is there a man living to whom he owes anything he has not paid? Is there a man who can say that he has ever treated him with anything less than absolute honor? Is there a customer who thinks he has ever misrepresented to him the length or breadth or value of anything? Is there a man in the streets, or anywhere, or a woman to whom he has ever done a tithe of injustice! He met, gentlemen—and she was not of his acquaintance previously, or of his family—this young woman. She was quite young; he was bewitched, he was fascinated, he was enamored, and was entirely given up to her. She held him with chains stronger than chains of iron. It was not, gentlemen, as I had the honor to say to you in the opening of this case,—and I hope you will believe that I undertake this double duty from no rash confidence in myself, but from a combination of accidents,—it was not, as I

said, an affection founded upon long acquaintance, not founded upon judgment, not founded upon knowledge of character; it was a bewitchment, a fascination; he was enamored; he must possess—as his wife's lover said, not long afterwards—he “must possess her entirely, or never think of her again.” He succeeded, and was married. And, gentlemen, from the day of his marriage, up to that fatal Friday night, the 16th November, he was constant, affectionate, just; not only a husband, but an elder brother, and not only an elder brother, but a father, in good counsel and good advice, kindly meant, kindly given—as Mrs. Richardson herself admitted, “he did his best;” and Mr. Richardson was obliged to concede that Mr. Dalton had been a kind and faithful husband, had been a good, attentive, thorough, industrious business man. But, gentlemen, from the day that he plighted his faith to her, on the 12th June, up to that fatal night, there was not an evening he was not with her; he gave up all his friends for her, his acquaintance, the young men and the young women that he had previously known; he gave up his own family circle; where she went he went, where he went, she went; her friends became his friends, her interests his interests; he guarded her slumbers, he guided her steps—he thought he did, he meant to do it, he meant to perform his duty faithfully, and as a part of it, from that day up to the night of the fatal discovery, he never left her side except from the calls of business. Four months, five months of married life passed. On the morning of the 16th November the sun did not rise upon a happier man than Frank Dalton; that night the sun set in clouds which never can be dispersed. He left the threshold of his door that morning with a light heart, buoyant step, an open countenance—happy, cheerful, he went to his day's work. He had a wife to work for, and he was working hard for her. She left the threshold of the house, and where did she go? Where had she been every day for the last six weeks or more? He came back, gentlemen, at night—a buoyant step, full of hope, full of affection, full of confidence, and he had a right to have it. He was but a

five months' husband; he had been devoted and attentive beyond the love of women. He came back at night, gentlemen, expecting to meet the embraces of his wife—and open, confiding and innocent wife. But, gentlemen, instead of that came this doleful discovery; and in less than one month, *in less than one month* after that night, this Mr. Dalton, who never stepped aside from the path of virtue in his life, was carried to and tro through the streets of Boston, manacled, chained, charged with the murder of his wife's lover! He was seized, taken to the office of the Chief of Police, kept until one or two o'clock in the morning, waiting the result of a *post-mortem* examination, and is then carried up to jail, to herd with the gatherings of a night's debauch, a night's wickedness; and then he is brought, chained—those hands that ministered to her subsistence and her wants, that hand which he had given her in fidelity and marriage, and with which he was ready to protect her at the expense of his life, those hands are manacled, and he is brought to the other end of this building, the gazing-stock of a gaping crowd, examined and remanded under a charge of murder, which does not admit of bail; placed where, as you know, gentlemen, they place men charged with the crime of blood, in the lowest tier of dungeons in the jail, on the north side, where the sun never comes, where hope, that comes to all, comes but rarely, and there he lies forty days, nearly—the occupant of a cell which had been occupied before him by Tirrell, who was saved by an effort of rhetorical power and skill such perhaps as America never before witnessed—Tuckerman, not a criminal of that sort, but charged with a high crime—the inmate of the same cell from which men had stepped to the gallows,—there he lay his six and thirty days, charged with the crime of murder of his wife's lover. Well, gentlemen, after he was arrested, and while he lay there in jail, he wrote letters to his wife.²²

Gentlemen, I know I have taken up a long time in reading

²² Mr. Dana read extracts from Mr. Dalton's letters to his wife while he was in jail.

these letters, or extracts from them, but I want you to see who the man is, and how he has treated his wife; I want you to judge whether he is a man to stand here and charge his wife with a crime of which he knows she is innocent; I wish you to say, on your oaths, whether he is the man who, having heard just exactly what his wife said to him in Shawmut avenue on the night of the 25th February, knowing every word she said to him there, knowing whether she confessed her guilt then or not, will bring forward witnesses to swear that she did. I want you to say, on your oaths, whether he is the man who, knowing that that night she declared to him her innocence and he forgave the past, will stand here and authorize his counsel to say that she then and there confessed her guilt, and that will allow any witness to stand up a moment and say that she confessed what he knows she did not.

I want to ask you gentlemen also whether you see in these letters any signs of the jealous man. Does he look at everything, as the learned counsel said, through the green eyes of jealousy? No, gentlemen, I have studied this story from beginning to end, and I do not see one moment of time when that man was jealous. You know what I mean by the word jealousy. It is not belief and judgment; it is mere suspicion, not suspicion arising out of evidence, because that is judgment, but suspicion arising out of a disturbed and disordered spirit. Gentlemen, I tell you he never was jealous. On the evening of the 16th November he found these letters, and it burst upon him in a flood and overwhelmed him; but what did he do? He went directly to Fanny Coburn, who was implicated. He called her to him alone, and produced the letters. He talked with her, he talked with his wife, he talked with Edward O. Coburn. He reasoned upon it, he investigated it, and he came to his judgment. Instead of being a jealous, tormented husband, he sat like a judge in the gate, he passed upon it and came to a conclusion that night. He said, "You have done wrong, very wrong. I have been a faithful husband to you. While I was pursuing my

business by day and attending and watching you by night, you were riding, visiting and corresponding secretly with a man whom your husband did not so much as know existed. You have allowed indecent, improper familiarities, you have walked on the very verge, but you have not fallen—I believe you.” He is ready to believe; his affections were engaged there; he takes her word for it. He came to that judgment, and from that moment until a later period he adhered to that judgment. He took her to his arms that night; he lived with her three weeks at Mr. Richardson’s; he took her to his own mother’s house on Sunday; he took her to his mother’s family circle on Thanksgiving day, and they received her there politely and kindly; he wrote these letters to her in jail; and now show me one moment when that man was jealous. Never! The evidence came upon him enough to overwhelm him, his heart was almost broken; but when she kneeled down on that Bible in which she had hidden those letters of her lover he took her word for it. He formed a judgment and on that judgment he acted, and I ask you gentlemen, whether, from the moment of November 16, that night when he formed his judgment, that as wrong as she had done she had not been guilty of the great crime, there has escaped from him, by mouth or by pen, one word that indicates an uneasy, disturbed, unreasonable, green-eyed jealousy. Not one. He formed his opinion and acted upon it. Does he refer to the past over and over again, torturing and tormenting his wife with, “Why did you do that? I want to reconsider this or reconsider that? What does this mean?” He endeavored to wipe out all of it; he makes the slightest possible allusion to the past, and never desires to speak of it again if he can avoid it; he is sorry the world does not judge of it as he does, but let the world go, we know each other. He never was jealous. And at the last moment, during the last few days of his confinement in jail up to the time of her confession, when the full evidence came upon him and he discovered and knew that his wife was guilty; from that time he acted, not in revenge, not in

hostility, but again upon his judgment; he says to her, "I have loved you;" and when Mr. Gove came forward with the offers to him of his ten thousand pieces of silver, his money and his credit, if he would take her and go off, he has but one answer, and it was the same everywhere: "Were she innocent, if Heaven had made me such another world of one entire and perfect chrysolite, I would not have sold her for it; but, as I know her to be what she has been obliged to confess to me she is, the world is not rich enough to buy me! I have loved her, but no more can she be wife of mine. I cannot any longer confide to her the guardianship of my honor; she has unfitted herself to be any longer the keeper of any man's honor and his peace of mind. I cannot take her to be the mother of my children; if the law does not compel me to do it, I cannot do it. But I have no feeling of hostility; I do not hate her; I do not hate you, Mr. Gove; I would not touch a hair of your head, and if any interference of mine, or my counsel can prevent any criminal prosecution against you, it is as your disposal. As for your daughter, she can no longer be my wife and the mother of my children."

That is the course he has taken. He did not regard the opinion of the world. He is sensitive to it, but he has acted in disregard of it. Yet, gentlemen, the public has been against him. The learned counsel said that when Mr. Dalton was brought forward on the charge of murder public sentiment was against him, and he was threatened with a hard trial, and public sentiment was not satisfied until he was dragged into the cell of a murderer. The public has been against him, and every tribunal he has been to has been in his favor. The Grand Jury first took it in hand, and they said, "No murder; we will find a bill for homicide, as we must." He was willing it should be, he wished it to be tried. There was the first tribunal that passed upon it. Then he went to the jury on the other side of the court house. The public was against him; they thought he was some ruffian and bully, who had taken his wife's lover into a cellar and there

beat him to death, and the twelve jurymen, before whom they sat on his trial, probably thought so too. The case was tried; he had the assistance of that ancient practitioner of the criminal law, Samuel Dunn Parker, with a little aid from myself; the case was tried to the bottom, and those twelve men with one voice pronounced him "not guilty." He pleaded guilty to the charge of assault; of course he assaulted Sumner; everybody knows it, but to the charge of homicide, they said "not guilty," every man of them. I do not know, nor do I care what the public thought of it. He does perhaps; but those twelve men who studied the evidence, acquitted him. They discovered, as the evidence all showed, that in that ecstasy when it was doubtful for a moment whether he would lay hands upon himself or on William Sumner, when he went out into the entry and exclaimed, "O my wife, my own wife! what shall I do? I wish I were dead," that then in a moment when he might have run from the house frantic, or laid hands upon himself, the sight of the man caused him to strike a blow. The man fled and he pursued him in the excitement of the moment through an open lighted passageway with no weapon, with no stop. The fugitive took the cars and went home, and was there engaged for days in field sports, shooting, playing foot ball, merry-making, and pig killing, until unfortunately he was attacked by a prevailing epidemic and died, as every physician said, of that. The jury knew those facts, and they acquitted Mr. Dalton. The tribunals have been his friend. He has had much to bear, as he says in his letters. It is something for a young man to be

"A fixed figure of the time, for scorn
To point its slow and moving finger at."

There is an epitaph, a word which it is not easy for any young man to bear. But yet he bore that well, very well.

Gentlemen, the case before you asks your judgment between him and this woman to whom he confided the custody of his honor and his peace of mind. You are not to pass

upon a question of guilt or innocence in the criminal sense of the term. You are not to go into motives; it is not of any consequence whether she yielded to the tempter in a moment as she says, or whether she yielded to him deliberately. It is of no consequence whether a judgment shall be pronounced upon her, in her own language taken from the passage of Scripture which by universal usage has been applied to the women found in adultery, "Go and sin no more," but the question is the fact. It is the trial of a civil matter, and you are to pass upon it to the best of your judgment.

Let me now run over rapidly—if I can ever do anything rapidly—a brief narrative of the events down to the time of which we ask your judgment more particularly.

Mr. Dalton came home on the night of the 16th November, happy, without a cloud of suspicion on his mind. He found in the bureau drawer of his wife a couple of letters which she had, as she said, first put in her family Bible and then in her wedding clothes, and then carelessly allowed to remain in her bureau drawer. He read them. He found also poetry which Sumner had copied and given into her hand,—amorous, licentious poetry. He waited for her return, when he called upon her for explanation. You cannot know, gentlemen, what explanation took place there. He left her—and I must be very careful in going through this narrative, as I am bound in honor not to state to you one word of what my client tells me, but must state the facts on the evidence which has been given. The learned counsel on the other side is bound by the same rule. But, at all events, this you know, that he left her behind in that place. He went to see Fanny; he wanted to see her privately. It was night, but his wife left as soon as he had gone, followed on rapid wings behind him, hastening to get there first, if possible, to seize Fanny before he could talk with her alone. But she was not quick enough. He arrived there; he took Fanny apart. There was company in the house—a few friends—he took her into a chamber, therefore, and turned the key of the

door. He had an interview with her. Fanny Coburn has said here that he then produced these letters, and offered to read them. She did not care to have them read. I suppose she knew all about it—I do not know whether she did or not; I believe she said she did. He questioned her, he talked with her; she does not tell us what took place—very little. In a few minutes Nelly arrived. She came to the door, she stormed and insisted upon getting in. She tells Fanny: “I have not told him anything, be careful what you say.” She runs below, she seizes something—it is a bed screw; she beats at the door—the dents are there now. He finds he cannot get rid of her, cannot carry on a peaceable conversation, and he opens the door. He sends for Edward; they take their wives separately alone, which was the most judicious way; they converse with them. There is company below, and there are two half-crazy women upstairs, so he takes Edward out, and reads him these two letters.

Frank Dalton up to that time did not know there was such a person as William Sumner on the earth. Edward Coburn knew there was such a man by sight, but he did not know that he had ever spoken to his wife or his wife’s sister. They read those letters, they conferred together, they went back to the house, they took their wives alone separately and they conferred together. The wives in the meantime had conferred together. The wives told the story, the husbands believed it. Frank Dalton put his trust in the story of his wife; he saw she had done wrong, wrong to him, very wrong. She had greatly injured him, but he trusted the extent of her story, he stopped short in his conclusions just when she chose to stop short in her narrative. He believed it, he acted upon it. They spent the night there. The next morning there was breakfast, but they (the men) could not partake of it. They must see those young men, they must confront them with the women.²⁴

That night where does he go? Does he go to take counsel

²⁴ *Mr. Dana* here referred to the flogging affair, ante p. 521.

of the public? Does he follow around after reporters and editors of newspapers to give a favorable account of it and put it in as an advertisement? No, gentlemen. What *does* he do? He goes directly to Mr. Emerson's house in Cambridge. His wife's father was away at the West. He does the next best thing,—he goes to his wife's mother. Does he even go to his own family? Does he go to seek counsel of them? Those Daltons, whom the learned and astute and most ingenious junior counsel opened his case with, as having brought forward and prosecuted this suit, having bound my client hand and foot by a power of attorney which he could not escape from—he does not even go to them, he goes to his wife's mother at Cambridge to tell this story to her. Saturday night, with Edward Coburn, they go to the wife's mother, to tell the story to her in the absence of the father. Was not that the case of a man who intended to do justly? Was that the case of a man who meant to expose her to the world? I tell you, gentlemen, that Frank Dalton suffered under imputations for months in this community, because he would not tell the story of his wrongs. He allowed the community to go on in the belief that for a single accidental meeting in a candy shop, for a few bows on the street, for a ride in an omnibus somewhere, he had taken a man into a cellar, into a dungeon, and beat him to death. He could not tell the story of his wrongs, he could not tell and never told it to the public. So much as came out at the criminal trial did come out, but no more than just up to the 17th November—not a syllable, he has never told of it. And when he brought this suit to dissolve this civil contract, he desired it should be done by consent of both parties, with as little publicity as possible. He went to her mother on Sunday. Again he meant to do justice, and he took his wife with him to meet Mrs. Gove at Cambridge, so that the story should not be told by one side. He meant the story should be told by both sides; if that wife had one word to say, he wanted to let her say it. But he believed her; he takes his wife to his wife's mother, and says to this

mother,—“Here is the daughter that has done me great wrong; don’t think too hardly of her; I believe she has trifled with her virtue and with my honor, but she has not betrayed me; I am going to act upon that belief; the same do you.” Then on Monday he took her back to the boarding-house in Summer street,—that grave, decorous boarding-house, as the learned counsel called it,—kept by women who are ladies. He took her there with whom? His friends, his sisters, his brothers? No. Mrs. Richardson, Mrs. Emerson, her friends, her family.

Then came the unfortunate death of Sumner,—then came the excited public opinion,—then came the charge of murder,—then came the hand of the officer laid upon him, as he was at his business in his countingroom,—then came the night spent in the Chief of Police office,—then came the note to his wife,—then came the dungeon,—then came the cell of the murderer for six-and-thirty days,—then came slowly, gradually, the first dawn of hope, the first tribunal, and he was bailed,—then came the next dawn of hope, the second tribunal, and he was acquitted,—then he came up to the law and said, “I did assault that man; I own it; punish me as you think I should be punished.” He received his punishment; it was confinement in jail for five months. He went to jail, and there he remained from the fifth of March to the fifth of August. I think that evidence was not admitted here as to the efforts made to procure or prevent a commutation of that sentence—who tried to commute it, and who tried to prevent it. He served out every day, every hour, every syllable of that time. In the height of the business season, cut off from all his prospects, with very heavy expenses of the trial behind him, and with a very dark future before him, he kept up the best hope. But then, gentlemen, I submit that you will perceive that about that time there was a change in the conduct of Dalton. It will be my duty not long hence to call your attention to the particulars of that change; it is enough to say now that there was a combination of one thing and another thing and another thing, to produce in his mind this determination. “I fear,”

he says, "that I have yet made a mistake, I fear that the whole truth has not been told me, I fear I have not got *all* your secrets; that there is something more behind here; I will not when I pass from this jail, commit myself irretrievably to you; I will examine for myself; I will sit in judgment on the case again; there is something more that I must look into; I will see how that is; but depend upon me, no public opinion, no voice of the world, nor the influence of my quiet family circle, shall guide my judgment. I will do justly and honorably by you, and whatever is just and honorable, you may depend upon it I will do." No sooner was the trial finished, than he instructed his counsel, on or about the 5th of February, to bring a suit for divorce.²⁵

Before, then, coming to the details of the case, it is proper that we should understand what the law requires us to prove, and how it requires us to prove it. Unless good cause is shown to the contrary, the burden of proof is not a reasonable doubt as in criminal cases. It is the rule as in civil causes. You are to be satisfied. But, as the great master says,

"How satisfied? Would you grossly gape on" and behold them in the act? That were impossible, but

"If imputation and strong circumstances,
Which lead directly to the door of truth,
Will give you satisfaction, you shall have it."

And what says the law? I propose to read to you a few words from the learning of that "ancient monk," Lemuel Shaw, in a judgment probably delivered by "candle light," on a table lined with green baize, which seems to have such terrors to the imagination of the eminent counsel on the other side—in a case which must have been tried as long ago as some twelve or fourteen years. A libel for divorce had been filed. Here, as in every great cause, I see the name of the

²⁵ Mr. Dana quoted also from *Loveden v. Loveden*, 2 Hagg. 19; *Williams v. Williams*, 1 Id. 299; *Burgess v. Burgess*, 2 Hagg. 228; *Matchin v. Matchin*, 6 Barr. (Pa.) 338.

illustrious counsel that appears here, and I wish that I could borrow, or even steal, for my client, some of the eloquence and argument which he used for his client then.

"I agree," says the Chief Justice, in the case of *Dunham v. Dunham*, 6 L. Rep. 141, "with the learned counsel for the libellant that this fact need not be proved by direct and positive evidence; like any other fact to be judicially acted upon, it may be proved by circumstantial evidence, that is by any facts which will lead the unbiased and discriminating mind of any man, viewing them under the light of experience and with known reference to the ordinary feelings of human nature and motives of action, to the belief of the truth of the fact. It is impossible to lay down beforehand, in the form of a rule, what circumstances shall, and what shall not constitute satisfactory proof of the fact of adultery, because the same facts may constitute such proof, or not, as they are modified and influenced by different circumstances. Suppose for instance a married woman had been shown by undoubted proof to have been in an equivocal situation with a man not her husband, leading to a suspicion of the fact. If it were proved that she had previously shown an unwarrantable predilection for that man, if they had been detected in clandestine correspondence, sought stolen interviews, made passionate declarations, if her affection for her husband had been alienated, if it were shown that the mind and heart were already depraved, and nothing remained wanting but an opportunity to consummate the guilty purpose, then proof that such an opportunity had occurred, would lead to the satisfactory conclusion, that the act had been committed'."

I want nothing more "monastic" than that. I also call your attention on the opinion in the case of *Bramwell v. Bramwell*, 3 Hagg. 629, from the same learned judge from whom the counsel for the respondent read.

The only difference between my learned brother and myself in reading law is, that while he reads his law from the same sources that I do, I find more cases in support of my argument that he in support of his. Sir William Scott was not a monk; Dr. Lushington, from whom I am about to read, was not a monk; they were both English gentlemen, married men, heads of families, who went to dinner parties and balls, I suppose, like other people. They were not clergymen, they were lawyers—members of the bar—just such men in substance as form the staple of the moving community. Sir Wil-

liam Scott and Dr. Lushington, whom the learned counsel has already cited, are men who understand and allow for the frailties of human nature; who know that a woman may go to a party and come home and be virtuous still, as I understood my brother to say; and though the court still bears the name of ecclesiastical, every monk and ecclesiastic has been driven from it for three hundred and fifty years, and the administration of the law is in the hands of lawyers, married men, who go to balls and parties, have seats in parliament, and know the world.

Gentlemen—Have we not here a secret correspondence? Why, here was this young wife, only four or five, nay, only two or three months married, and from the later part or middle of September to the time when no act of virtue of hers, but an accidental discovery, broke it off, she was keeping up a secret acquaintance with this young man Sumner, without the knowledge of her husband, of her father, of her mother, of her sister Mrs. Richardson, of Mr. Richardson, who did not know his name, of her sister, Mrs. Emerson—a secret acquaintance studiously concealed, and increasing in its intensity every day.

The burden of proof is upon us in this case. It would be weak and foolish of me to offer to say, I am going to prove anything which I cannot prove. I ask your judgments, gentlemen, on this acquaintance. Why was it secret? Was there anything in William Sumner to be ashamed of? Was he a criminal? Was he a known libertine? Was any mark of disapprobation upon him? Why was it secret? Why should not her husband have known it? Why not her sisters? Why was it necessary, when walking the street with Mrs. Abby Richardson, and Sumner passed, that there should be no recognition between them? What harm was there in the bow in the street, what harm in an acknowledged and returned salutation? But the quick eye of Mrs. Richardson saw there was something wrong, and she asked, “Who is that young man looking at you?” Miss Snow, a young lady who went about with them, in a very innocent manner—for she is a

very respectable young lady—asked her about this acquaintance whom she met at Vinton's, when she was there with Miss Snow. Miss Snow says, in her deposition, that she observed that this young man met them there. Sometimes they talked and sometimes they did not; once she passed a note to him under the table. She noticed that when they went to Vinton's saloon, if he was not there she would sometimes wait a little while, and if he was there first he would wait for her. She told her once, "My husband does not know that I know him and I do not want him to." Then when Mr. Frank Dalton, in order to give his wife some little entertainment—she being perfectly well aware that he was worn out by his day's work, and he supposing that she had been all day at home—took her and her friend Miss Snow to the theatre, why then there was a most extraordinary "accidental" meeting; this young man who lived out in Milton happened to be there a few seats in advance of them, and when Mr. Dalton was walking about with his wife and Miss Snow in the elegant saloon of the Boston theatre, Sumner passed and repassed and kept close by them all the time, and no recognition passed between him and Mrs. Dalton. I suppose this was "accidental." Is that a secret acquaintance? Why secret? Why could not she have bowed to him as she did not? Why refuse to know him as she did when with Mrs. Richardson? Why did she not say, "That is young Mr. Sumner, a very good fellow, his brother a highly respectable merchant in this city, the cousin and acquaintance of a young lawyer here, Mr. Porter; it is all right, I know him?" Why insult her husband? For, if there ever was an insult put upon a husband, it is when a lover comes into the presence of himself and wife, takes a seat near by them, passes and repasses them in the ante-room, and no recognition takes place between them, and she knowing it all the while; if there ever was an insult by combination, put upon a husband, it was then and there.

I show you two letters, found by accident and which brought on a discovery, and all the rest of the correspondence destroyed or suppressed. And what does that mean? Is not

here a "secret, clandestine correspondence," with a vengeance? Kept from the sister, kept from the friend, kept from the husband, and all her letters to him destroyed but the two we seized upon!

Is it not secret? That correspondence was denied even here. The learned junior counsel rises and says there is no proof that she ever received or sent the letters. The learned senior counsel said there was not a tittle of evidence that she ever received them. At length the evidence came in, and it was conceded. Why was it clandestine? I think you will cease to wonder why it was clandestine. You will cease to wonder why the learned counsel struggled so manfully against admitting it. Here is the first of those letters. It is dated "Wednesday a. m." He says, "My own sweet adored Nellie; your note of Tuesday is now before me." It has never been before us. "Every word has been read ten times over. How can I ever repay you for the affection you have lavished upon me." *Lavished* upon him. "Will a whole life-time of unceasing devotion," &c.; he goes on with all that stuff that every seducing writer avails himself of. Then he says:

"My best beloved, dearest Nellie, forgive me, if in a moment of thoughtlessness, I have said or done aught that could wound your feelings; forgive me, if the excess of my love has caused me to express myself too warmly."

What does he mean by that? Has he not just told her that she has lavished her affection upon him? She is his sweet and adored Nellie, and he is willing to devote his whole life to her. That is not offending her feelings; of course not. But he refers to something that has. What could it be that he had done? What could he have said more frank than that? After calling this young married woman his own Nellie, his sweet Nellie, his adored Nellie, and that her affections had been lavished upon him, he fears that he has before that said some word at some time which has offended her, and he asks her to forgive him, if in the excess of his love, he has expressed himself too warmly,—the "excess" of his love.

"My own Nellie." Was she his own? Did she ever tell him that she was not? Did she ever say to him—No; there is the man whose own I am; you mistake, Sir. "My own Nellie." William Sumner's own Nellie!

"My own Nellie, if you experienced the perfect agony of love which thrills my breast, you would be able to overlook all the indiscretions into which such an ardent passion might lead me."

I think that is pretty fair notice to a young married woman what she has got to meet. He gives her notice that the agony of his love, and the ardor of his passion, may lead him into indiscretions. That is pretty fair notice, what he is and what he is likely to do; while we have already had a pretty clear intimation that he had already done something which he wished to have overlooked.

"Dear, Nellie, I cannot much longer support this unspeakable pain—this sinking of the heart—this burning of my brain—this tension of every muscle, and fullness of every vein. My mind is confused, and my whole system seems burning with a liquid fire."

If you want a minute and detailed description of a sensual and corporeal passion, there you have it. There is nothing Platonic about that. There is not much spiritualizing in those full veins and tense muscles.

"Dear Nellie, it is you, and you alone, who can allay this agony; you, if you will, can bid these fires to burn more brightly and yet less consumingly; you can still the overwhelming tempest of my passion, and soothe my troubled brain, and will you not, Nellie, after teaching my young heart to love, will you not let it feed upon love or teach it to cease loving, for it must do one of these—either possess you entirely, or else think of you never again."

Such language as that carries meaning to a young married woman. After teaching his young heart to love, she must either let it feed upon love or teach it to cease loving, for he must either possess her entirely or never think of her again. Was not this occasion for a pause? Did ever Aristotle, did ever Whately, or any master of logic lay down more distinctly a dilemma? I must "either possess you entirely, or think of you never again."

"Nellie, dearest appoint some time when we can meet, and be alone, free from disturbance, where I can pour into your ear what I cannot express by my pen."

Now he becomes practical. This letter they do not pretend she did not receive, for she answered it; he refers to the answer, and presently I will show you how she answered it. After telling her his condition, his corporeal, physical, sensual love, he becomes practical, and proposes the *modus operandi*, the ways and means. How much more than was expressed with the pen he intends to pour into that ear, when he should be alone with her and free from disturbance, judge ye—

"Do this, Nellie, and trust me when I assure you of my unwavering attachment."

"Do this, Nellie." Don't do it, Nellie, for your life! But she did it—she did it. Oh, had she but told her husband; had she shown him this letter, and said to him when she saw that Sumner had gone so far—"Frank, you don't know that for weeks I have been with this man; he has now said things to me that I could not misunderstand, and I cannot apologize for them; he has gone too far; he has written me this letter. Oh, the shame and sin of having such a letter written me! I cannot bear it. Take it back to him and I will never think of it again. I have met him again and again; I have been in omnibuses with him; I have walked with him; I have written to him privately; but now he wants a solitary meeting; he has driven me to the dilemma; it cannot be a moment longer an innocent acquaintance, if it ever was; he has asked me to name a time and place. Frank, I have sinned; there is the letter, take it back; I will never think of him again. He shall not possess me. I have done wrong, but I will not go a step farther." If she had told Mrs. Richardson, if she had told her father, if she had told her mother, if she had told anybody, she would have been reclaimed; I do not know the heart so base that would not have interfered and snatched her as "a brand from the burning." But, oh, gentlemen, she

did not; she answered it; she answered that letter; she accepted that dilemma. She said, "You need not cease to think of me; I take the other side of the dilemma; I make the appointment."

Now comes his letter in reply to that; and before reading that let me dispose of a mere bubble, for "the earth hath its bubbles, as the water hath, and this is of them," that she never opened the letter. That letter was found in a bureau drawer without an envelope, just as it is now.

Mr. Choate: The evidence is not so; you misstate it.

Mr. Dana: I am not stating the evidence at all yet; I am stating the result of it. It is only a question of time. I am not bringing it out in Mr. Choate's way, but I am doing my best to get it before you.

She acts upon that letter. He names a ride as the way to meet, in this letter, written upon Thursday the 15th, and a ride took place upon the 16th. This letter then was acted upon. More than that. In the first place, I pronounce the whole notion that that letter was found closed or sealed up utterly and entirely false. There is not a word of truth in it.

Mr. Choate: The seal had not been broken, is the evidence.

Mr. Dana: Do you desire again to address the jury; if so, I will give way.

Mr. Choate: I merely correct the statement of the evidence.

Mr. Dana: I understand that the practice at the bar is that if I mistake a fact, I am liable to be interrupted; but in arguing upon evidence, in collating and in reading parts of the testimony all of which is not to be brought in, the selection is left entirely at the discretion of the counsel himself. Now I do not care whether he said the seal was broken or not broken, it is of no consequence; the question is whether the letter was unopened. I think I have abstained from interruptions, while hearing a great deal of the testimony quoted here.

Is it very likely that she would have left it unopened? Is it very likely that having been called upon to decide

whether he should possess her entirely, or cease to think of her forever, and having decided that he might possess her entirely, and need not cease to think of her, having left it to him to make an appointment, she should not open his next letter? He was earnest enough in expressing his passion, telling her that she must give herself to him or he would never think of her again; but after she had decided, it was not necessary to be so earnest, and he talks now more like a possessor than a suppliant.

"My charming one,—Yours was full of all I could wish."

And what did he wish? He has told us what he wished. He says he must possess her entirely, that he can no longer bear this burning, physical, sensual, amorous love, that he wants to feed upon love, that he wants her to name a place where they could meet in private and alone, and free from interruption. Then he receives her letter, and he says it is full of all he could wish. Where is that letter that was so full of all he could wish? You have a right to guess at and spell out that letter. It is not a letter with 11 lines written over with *m*'s, so that no one can read through to see what is underneath. It is a letter destroyed and you cannot see it, but it was full of all he could wish. If it were here, you would decide this case, I suspect, very soon. But I do not see, after all, what need there is of the letter. Mr. Sumner said that it was all he could wish, and if he was satisfied, I am, and I think you may be.

He says in this letter—"You say I must be tired of your foolish notes." So she had written notes, so many, that she was afraid that her lover would actually get tired of them—filled to repletion. Then he asks if he has ever indicated—what? Anything wrong? No; but anything to indicate that his affection for her is faltering.

"Have I ever expressed myself in such a manner as has indicated that I have ceased to be interested in all that pertains to the love you bear me?" What was the fear that she was beginning to entertain? A fear that he had lost

a little of his interest. It was one of those groundless and jealous fears which always beset the path of unlawful love. "I beg you to forgive me." For what? Indiscretion? No; but if he has ever at any moment indicated the slightest faltering in the extremity of his love. For that he asks to be forgiven. I do not see that that letter sinks so far below the other. In that, he says, that if the extremity of his passion has caused him to express himself too warmly, he asks to be forgiven; but in this he asks, if he has faltered in his affection for her, that he may be forgiven; if he has failed to come up to the mark, to the stature of a perfect man in this enterprise, that is for what he now wants forgiveness. Now he becomes practical again. He says

"Dear child, you leave the appointment to me. How can I answer you? My inexperience has hitherto never rendered it necessary to pursue such a course, and therefore I feel a certain degree of bashfulness, in assuming the dictation, fearing that you may refuse or disagree, but if we can ride out together we may then converse perfectly at our ease. Will that course be agreeable to my own best beloved one, or if not will she give any orders relative thereto to her most faithful and affectionate W. S."

He had told her that he must possess her entirely, and asked her to make an appointment, that she should name a place where they can be alone, free from interruption, where he could pour into her ear what he could not express with his pen, and that after all that he had expressed, and she leaves the appointment to him, *carte blanche*. What is there left of a married woman after that? His experience has never rendered it necessary to pursue such a course. How is that? Had he never been to ride? Does not he know the way to a tavern? Does not he know how to find a place to water a horse? What is his inexperience which never made it necessary to pursue such a course? Well would it have been for him if that inexperience had never left him. The man who goeth in to his neighbor's wife, "a wound and dishonor shall he get." That is the great law that always comes to pass—the edict of the Great Lawmaker. "And therefore I

feel a certain degree of bashfulness in assuming the dictation." Bashfulness! The man that had written those letters had reached a point where even he felt a certain degree of bashfulness! Why, gentlemen, he was almost oppressed with the magnitude of the act he was himself about to perform. I dare say it may be true that his inexperience never had led him to that extent before. I dare say it was the first time he had ever indicated a distinct assignation to a married woman. He was inexperienced, and he did feel bashful. However, he is ready to do his best. That was Thursday, the 15th. She left it to him. He suggested a ride out. And upon the 16th they did ride out. They rode out after those letters. They rode out with that understanding.

At Vinton's saloon these appointments and meetings first took place, and were changed to Fera's saloon. Why these parties preferred Fera's to Vinton's saloon, why the change was thought expedient, does not appear. But there they met and they met very often. Miss Agnes Keenan says she didn't come to the shop till the end of October, therefore her acquaintance with her does not go beyond the first of November. Mrs. Fera says they began to come to the shop about the middle of September. She met him twice in Summer street by her own admissions—twice in Summer street at her lodgings, with those two rooms, the sitting room and the bedroom opening into one another by folding doors; he met her there twice alone of course, without the knowledge or suspicion of the husband. It was not communicated to her husband that he had ever been there. He met her at No. 84 Shawmut avenue, the house of Mr. Edward O. Coburn; he met her there on two occasions; that is conceded, Mr. Foreman; that is testified to by Fanny Coburn. These meetings could not have been accidental, for the reason which I shall have the honor to suggest to you. She lived in Summer street; that was her home; he lived in Milton, and was attending a commercial academy in Boston. He went to 84 Shawmut avenue but twice; and both times she was there; on one occasion he came with him, on the other he found her there; she had gone

there to have a dress made, and prompt to the time she was there. Of course you are to understand that meeting could not have been accidental—that twice he went to 84 Shawmut avenue and she “*happened*” to be there, you will know of course was not an accident. The ride to Watertown was on the 15th, the ride to Brighton was on the 16th, and the affair at the house on the 17th; so it was the day after his letter acknowledging the receipt of her’s that the appointment was carried out.

Now we are looking at circumstances, for, as the learned judges very properly say, this circumstance or that circumstance does not prove it; but that is not the way to look at evidence: you must take all the circumstances. It is not a single thread that holds the ship at her anchor when the storm rises, but it is threads woven together into a strand; and it is not this strand, but it is the strands woven together into a cable. So you look at testimony: it is not this thread nor that thread which the learned and eloquent counsel untwists, and, taking them one by one says, “This does not prove anything, and that does not prove anything;” but it is the whole, taken together.

Now let us look at the meeting of the 15th November, the carriage ride to Brighton. Was that accidental? These young men, Porter and Sumner, had never been at the house of Mrs. Emerson; Mr. and Mrs. Emerson say they had never been there; Mrs. Fanny Coburn says they were never there. They were hovering about the house, but they were never there; they did not dare to show their faces. Why not? Their position in society was good enough—as good as that of the younger women themselves. Why not? They hovered about; they went to Fanny Coburn’s, when her husband was away; they never went to Mr. Gove’s; they went to Summer street, when Mr. Dalton was away. They hovered about Mrs. Emerson’s, to meet the women when they came out at a given hour by the clock, but they never dared to show themselves then and there, because they knew they were conducting an unlawful business. They knew it. Who seeks dark-

ness rather than light? Who skulks and hides himself? Who is unwilling to be seen and known? It is the man who is conducting an unlawful business, is it not? Those young men were conducting an unlawful business, or they would not have objected to being seen. Sumner is doing something which he does not wish to have known, when he meets Mrs. Dalton. At the theatre, with her husband, he does not bow, because he is conducting business which he does not wish to have known. When they go to Mrs. Emerson's, instead of saying as they would to a friend when they were carrying on a flirtation, "We would like to know your sister, Mrs. Emerson—let us be introduced there; we will have more plans to meet you;" they hover about, not daring to show their faces. It was because they were carrying on an unlawful business.

Now, gentlemen, was this an accidental meeting? What does Mr. Burns say! He says that two young men—one of whom is a lawyer and a member of this bar, though not for the last few weeks in *constant* attendance, the other a younger man living out at Milton, and attending a commercial academy somewhere in Boston,—these two young men come to his stand, and they want a carriage. They tell him to drive right out over Cambridge Bridge and up Harvard street; and then to drive a little slowly. Then they look out into a side street and tell him to drive into that street out of Harvard. There they stop, and two ladies come there. Then there is a conference; then the two ladies go back into the house; then they come out of the house, get into the carriage, and drive off. That is the evidence of John Burns the driver. He did not show a disposition to testify too strongly in favor of the libellant, because men who drive young men about taverns to have a "good time," of course are not expected to say too much about it; they may not be employed again if they do, and therefore they are the sort of men that keep pretty quiet, and "don't look over their shoulders," as the counsel says of some of the witnesses. That is the account of John Burns, and of course it is the correct account.

Now is it not most extraordinary that these young ladies,

one of whom lives in Summer street and the other at No. 84 Shawmut avenue, and these two gentlemen, one of whom is a member of the bar and the other lives out at Milton, should happen to have met near Mrs. Emerson's door at the side street where there was a coach standing? That all may be, but the doctrine of chances is very much against it; it looks more like an intended meeting than an accidental meeting. I think we may understand a fortuitous concurrence of atoms that would make a world, and I do not know that Paley's watch would not stand against it; but it is an extremely improbable supposition to put before sensible men that these parties all met there accidentally. But Fanny says it was, accidental, and surely Fanny is a credible witness.

Well, these young men behaved like perfect gentlemen Fanny says—and certainly she knows—all the way to Brighton and into Boston, and John Burns says they were having a "pretty good time" in the carriage.. Then the wheels wanted greasing. *That* was accidental. John Burns said they seemed to be having a good time, and when persons riding with him are having a pretty good time he thinks it is about time his wheels need greasing, so he thinks they had better stop at a tavern, and he tells them one wheel—that is enough, one is as good as four when it comes to that—needed greasing. I take it all these phrases about greasing wheels and watering horses are technical.. I am inexperienced in those matters, but I suppose wooding up, greasing wheels, watering horses, are all technical. The wheel held out fortunately, and by very remarkable good luck they didn't break down; they actually got safely into the yard of Wilson's hotel without breaking down or the axle taking fire—that is the danger I believe when it is not greased. They stopped at Wilson's, late Burlingame's, and there the wheel was greased in the yard. They staid and had some refreshment. But, says the eloquent counsel, "There is a wide difference between a flirt and an adulteress." "Flirt," "coquette,"—what does he mean by that? It is a dangerous

thing for a married woman to be a coquette; it is a bad indication for a young married woman; five honeymoons not yet wasted, to be a coquette! I understand by a coquette, one who has attentions paid her generally; but when the woman comes to center all attentions in one person, she ceases to be a coquette; when she knows but one man, and meets but one man, and writes to but one man, and forsakes all others and keeps herself to him alone—she is not a coquette. A book may call her so; the narrative which we have all read may call her a coquette; and the broken tombstone in the graveyard at Danvers, with its well-worn footpath, may be erected to the memory of a coquette—but that was a coquette who trod the verge a moment too long; she allowed her attentions to be concentrated in one man; she made too many “pauses;” she took too many steps after her pauses; she listened a “moment” too long; she dallied with the tempter too long, and “in a moment she yielded to the tempter;” and the end of that coquette is the broken shaft of a tombstone in the graveyard at Danvers, and her infant by her side. Our experience and all the maxims of life tell us that the woman who hesitates is lost. A French maxim says, “It is only the first step that costs.” The woman who deliberates is lost. Why, gentlemen, look at that calamity which staggers our confidence in the social system under which we live—the ruined women that haunt the streets of every great city. Who are they? Are they women trained to vice? Not so. Those that one meets on the pavement of Broadway, and even of our own small city, where are they from? Look in their countenances, hear their voices; they are many of them women to whom virtue was once worth something. They come from the farm house, from the factory, the mill, from the service of good families; they are daughters of yeomen, of honest men, children trained at the domestic altar, in the public schools. And what is their story? It is the old story, which is the foundation of so many of the novels which have been written; it is the old story, that carries dismay into so many hearts. The

way is smooth and dark, the current unperceived, the weakness painful and most pitiful. They tread the verge a "moment" too long; they become dizzy and they fall; they listen to the song of the siren a "moment" too long; it is too late to stop the ears then and fly, to hoist the sail and depart; you cannot do it. Unless the ear is closed with wax, when you approach the enchanted island, you are too late. Those women, who throng the pavement of Broadway, or Regent street, and Haymarket, are most of them women who listened to the tempter a "moment" too long; they have not yielded intentionally, deliberately, but it is "in a moment" that they have yielded. That is their history, the world over.

Gentlemen, have you ever witnessed the play of the "Stranger," which—though it is written in bad English and is full of balderdash—I think no man who has a heart in him, will see willingly for a second time. She listened a "moment" too long; she "yielded in a moment;" she sought reconciliation, bitterly, and with tears. The delusion was dispelled in a "moment," and she after all had much of the noble woman in her. Ah, gentlemen, the mistakes of a life are often small in appearance. It is suddenly and secretly that character is ruined and virtue lost. But after all, perhaps it does not begin there; somebody "in a moment yields to the tempter;" but there is usually a history behind this; there is a moment when she becomes giddy and falls; but why was she there? There is a reason for that, there is something behind it; it is not often the case, except where violence is used, that there were no premonitions. A married woman, when secret attentions are shown her and she accepts them, knows what they mean—when the man she meets is not to be known to her husband, not to be recognized by her when she with her sister meets him in the street, when he is not to enter her sister's doors, when he meets her at rides, when he gives her rings and books and bouquets;—there are "pauses," there are stopping places, and the virtuous woman stops there.

I will not be hard upon the flirt, the coquette; but there must be a place where she shall stop. I admit that the distance between familiarity and the *magnum opus* is great, but there are stopping places, there are indications, finger points, and guide boards by the way; Providence has not left us without them. Though fools they may read as they run on their dangerous course, there are pauses, there are things that give them warning. In the first place, she said to Miss Emma Snow, "He gave me a book, a boquet, and I returned them." Well done, Nellie! You did right; you would have done better yet if you had told your husband; but we must not expect too much. There she paused; she knew it was wrong. Will it after all be said that she did not know what she was doing? Early in the acquaintance she saw through it; a boquet and a book were given her by a man who did not choose to know her husband. She knew what danger there was in that boquet and that book, and she returned them both.

There was the first "pause," and she conquered; she knew it was wrong, and she returned them. What was the next thing? We next find that a book was given, and *not* returned; then a boquet given and *not* returned. Then she allows him to put upon his finger her husband's ring; she thought that was going too far, and she took it back and gave him another, and she wore his and deceived her husband; she knew it was wrong; she did not stop; she went on.

Then comes the letter, the fatal letter, declaring his love, picturing it in ardent terms, saying that he must possess her entirely or cease to think of her more, saying that he must feed upon love, and asking an appointment so that they can be alone, and he says, "Do it, Nellie, do it." There is the great pause. It was not a word. If it had been a sudden word, of an importunate lover, overmastering her by his importunity in a convenient place under the bewitching moonlight, and she had fallen, we could have wept over it. The moon might hide its light behind the clouds to weep over it. But it was a letter. It was a *written* proposal. She had time.

She read it. She had not the excuse that it was pressed upon her suddenly. She read the letter. She understood its meaning. Oh, she ought to have fled to the mountains, not lingering in all the plain, lest she should be consumed. But she did not. She accepted the appointment. She passed the last great pause, the last stage on this downward road, this *facilis descensus*. Providence has placed for us all, stages, pauses, finger posts, indications that the fool may read. She reached the last, and she passed it.

The next day, the 15th, she went out in the omnibus with them. There was a point to pause. There is the carriage at the roadside; and there are two men, neither of whom can be recognized as acquaintances. What did she do then? She went into the house, her sister with her. Does she pause then? She comes out, enters the carriage, and they take the ride. She says she was deceived into it. But then comes the next day. She has had a night to reflect upon it. On Thursday, the 15th, after that ride, she goes home to her husband. She has time to think. She goes home and presents herself to him—unsuspecting, confiding as he was. One would think that that would give her pause. But the next morning, true and faithful to her appointment, she is in Harrison avenue by the clock. He is there by the clock with his chaise, that they may ride out together, that they may be alone, that he may feed upon love, that he may pour into her ear, free from all interruption, what he dares not say with his pen, or cannot. There was the last pause—no, there was another, according to her story. When they got to Watertown, then he made a proposition to her, and she says she understood it. Good God! will she not pause there, if anywhere? No; she gets into a chaise and rides with him to another tavern, and goes into another room alone with him. Now, is it not more than she or anybody else has a right to expect, that you will stop with your conclusions just when she chooses to stop in her narrative? Is it not in defiance of all we know of human nature, that persons between whom have passed such letters as these, seeking the interviews which they indi-

cated, should have had the opportunity presented, without taking advantage of it?

One of the worst indications about those meetings is the deception and the prevarication. Why do they not tell the truth about them? Why not admit that there were intentional meetings? Why try to palm them off as accidental? But then it was one of those many deceptions which daily and hourly for these six weeks she had been practicing upon this poor man. Daily and hourly deceptions; and about what? The deception about the ride is nothing; every look she gave her husband must have been a deception, every embrace must have been a deception; and yet the learned counsel says that he would have known it if she had changed under his eye. Perhaps he did know it. Perhaps he attributed it to the natural effect of time. The ardor of the first marriage, the first few weeks, or the first few months, was passing off, and naturally subsiding from the enthusiasm of love into common every day life of the husband and wife. He might have attributed it to that. Might he have hung over her dreams to catch the words that escaped from her then? She did not, like Parasina, betray the name of her lover, in her dreams, but then this poor man supposed that every sigh and every embrace was meant for him to whom they belonged by the law. Was she changed under his eye? You do not know how much he perceived or how little; you do not know whether there was any change allowed to be perceived. But her whole life was a deception. Those letters hidden in the family Bible and in her wedding garments were a deception. Every morning, every afternoon she left his house to go to meet this man at the saloons of the city. Did he know it? When he took her to the theatre, in his kindness, did he know that that enemy of his peace was there. Did he know when he came to his own door, and sat down in that room at night, that the same seat had just been occupied by the secret and clandestine lover? He found not Cassio's kisses on her lips. But every word, every act, was a concealment, from him. Now such a long concealment is inconsistent with the idea

of innocence. How are you to account for it? Why should there have been concealment? There was not the slightest reason why he should not have known of this acquaintance, unless there had been guilt behind it. I ask any one gentleman upon your panel, I ask you twelve gentlemen,—who, I know, have not yet recovered from the charm of that eloquence which made beautiful even the foul air of this courtroom—I ask you to tell me why she never made known her acquaintance with Sumner, why she concealed it.

What charm was there that led to this interest in him? I can easily understand that a young woman whose husband is inferior to her, may meet a man in a superior station, of superior intellect, of superior experience, who has the charm of reputation, or heroism, or fame, and may be fascinated mentally, and yet have no dangerous affection for him. But where was a charm like that about William Sumner? There was not one respect, unless it may have been, though Dalton is young and handsome, in respect to some other attractions which ought not to hold for a moment the fancy of a married woman. Unless it were something of that kind, there was no point in which he was not the inferior of her husband. Some women are attracted by position. They love a high rank or station in life; and it is quite true that a man occupying a high position, a man of a family distinguished in society, may have a fascination over the mind of a person in an inferior position. But the position of Sumner's family, although he has a brother who is a wealthy merchant in this city, was not equal to that of the Dalton's—they are humble and respectable yeomen of the county of Norfolk. His education was far inferior to that of Dalton. He was illiterate. He passed from carrying a basket for a provision store rapidly up to a position in a counting-room, but he was illiterate. He had no reading; he had no culture; he had nothing to attract the fancy of a woman unless it be some physical attractions. He had no past experience. Milton and Boston were all he knew, and probably he did not know the best of them. He had no tale to

tell of dangers run. He had been in no battle. He had stood upon no wreck. He had seen no foreign land. There was no charm of conversation; there was no charm of position; there was no charm of culture. There was no charm which could have misled for a moment, without disgracing, a married woman. There was no superior wealth, for he was poor. Sometimes a rich man by his presents and his gifts may take the fancy of a weak woman, but he was poorer than her husband. There was no relationship or family connection which could have sanctioned it. It was a secret, clandestine, disavowed acquaintance with a young man possessing no attraction which we can plead in extenuation of her folly, and kept up to the last moment, upon her own admission, and not reconcilable with virtue.

But with her knowledge and experience of him she took that ride. She knew what it was appointed for. She had made her last pause. Here was the last step, and she took it. He had warned her that the excess of his love would express itself warmly, that the agony of his love would lead him into indiscretions, that he must possess her entirely or never think of her again, that he must feed upon love, and with that knowledge she took this ride. She met the appointment. The day before she had torn up all his letters; and why? I think they had got past letter-writing; and the time had come when the evidence had better be destroyed, and it turned out that two letters, carelessly left, as was stated by Mr. Durant in the opening of the case, brought on the exposure. The rest were destroyed. The time had come to do it. With the evidence of the ride I need not detain you long; but it was past the middle of November. There were no attractions in a ride in an open chaise then. They were gone for hours, all we know is that they went to two taverns—to two private rooms, where they were alone. That is about all that is vouchsafed to us. We do know that at the first tavern he made her insulting proposals, and that then she went to a second tavern. Over that second tavern she and her friends have thrown the mantle of silence.

Fanny says she never told her of anything that took place at the second tavern, or that anything took place there. They were in Watertown and he made insulting proposals. She could have come back in the rail car or in an omnibus. She could have thrown herself upon the protection of anybody. What terror has Brighton for her that she must make excuses for going to Brighton? What harm was there in going to Brighton more than to any other town. She does not give excuses for going to Watertown. She does not say that they went to Watertown because the horse needed watering, but she finds excuses for going to Brighton. Now if, as she pretends, nothing took place, but that she went into a private room with Sumner, and stood by the window while the man watered the horse, what on earth is the reason that Brighton possesses such terrors for her, that she must account for it by the foolish story of watering a horse just come out from a stable? She knows that Brighton has terrors for her, and she knows why. You call up your boy, and he begins to give half a dozen excuses for being in a certain place; you never thought that there was any harm in his being there, but your suspicions are aroused. There is something in his own heart which tells him that he must account for being in a place which you would never have thought required any explanation more than any other place. She knows why she is driven to the folly of absurd and preposterous excuses to account for Brighton.

The natural effect followed from all this. She could not serve God and mammon. She could not serve two masters. She might for a time, because I very much fear that the chief ingredient in her affection for her husband was of that nature which is transferable. Be that as it may, she could not at the same time serve both entirely. Were her affections alienated from her husband? In his letter Sumner says she has "*lavished*" her affections on him, that she has given them, not that she has fairly dealt out a portion of the treasure, the greater share of what she is bound to guard as her husband's right, but she has *lavished* them on him. Every af-

fection that she took from her husband and lavished on him, was alienated from her husband. Then to that letter she writes a reply which was "all he could wish." Were her affections alienated from her husband? Could she have met that man as she did at the theatre, if her affections had been true to her husband? Could she have kept this secret so long?

I care but little for the evidence that was furnished us of what she said and did at this house upon the 17th November. It does not prove much of itself; but it is just exactly what we are bound to expect. Just as sure as the day followeth the rising of the sun, just so sure would it be that when her husband and lover are both placed before her, her affections would have gone to her lover; and they did. When her lover knelt at her feet and called upon her to protect him, where did her affections go? To her husband? No; to her lover. She preferred him to his face. And before that, when her husband was going out to meet him, did she not call out and say to him, "If you go, I hope you will be brought back a corpse?" Who testifies to that? Edward O. Coburn says it; but you must not believe anything he says. Mrs. Mary Hunter says it; but you must not believe anything she says. Adeline Coburn says it; and they have not yet told you that you must not believe anything she says. But the learned counsel says that is a touch of nature; it is all right; it is just as Dido did at Carthage. That was most unfortunate. With all his illustrations from life and books, the only instance he can find of a woman who did it, was a *confessed adulteress*! That Trojan prince had fled from that city which the *first* adulterous Helen had laid in ashes. The Carthaginian queen calls out to him that the waves might cover him, and when he went, she died of love and shame.

I would like to borrow from the learned counsel some of the denunciations which he has thrown upon our witnesses. I would multiply them tenfold, if I could, to lavish them upon my client. When that powerful intellect trod the wine-press of his wrath against our witnesses, with his garments dyed

in their blood, if I had the power I would multiply those denunciations a hundred fold, to bestow them upon him. Such guilt, such crime, such enormity never was heard of. I do not know that the annals of crime have ever indicated anything like it. He had an interview with his wife, say they. She told him she was innocent; and, as the learned counsel says, he took her to his arms, and she was as much his wife then as she had ever been. And yet he comes here and says through me and through these witnesses upon the stand, that there she confessed her crime. Gentlemen, if you think that is not true, not only give your verdict against him, but drive him from the city! Move these walls, set the galleries at him! No jail, no cell—the place where they put condemned murderers, is too good for him. Make a scapegoat of him! Bind him with the scarlet filet, and send him off to the desert, that he may die of thirst at the brink of the salt sea! The credibility of this confession rests upon him. She met him there; that is conceded. They were there together; that is conceded. The interview was sought by her and not by him; that is conceded. Something took place; that is conceded. They never met again; that is conceded. And yet, say they, if she made no confession, why do they not meet again? To be sure, it is a part of our case, we put it in ourselves, that she clung to him, that she implored him and begged him to live with her, said she would go with him anywhere, to the ends of the earth, where her shame was not known; her father would furnish the money; clung to him with tears to the last. He finally said that on Friday he would be at her sister's, and would meet her there. She left in tears, but with some hope. But, upon reflection, he said it was not worth while to keep the agony alive longer; they had better break at once; and he sent her a message that he would not come; and they never met again.

The next day she wrote him a letter, and of that letter I have to say a few words. We offered the letter at an early stage of the case. It never crossed my mind that objection would be made on account of that erased passage, and there-

fore I did not put up the evidence to that point with any strength, because anybody can read that passage. You will have it with you, and you will see there is no manner of difficulty in reading all that is under those lines. Her handwriting is difficult to read, anyhow—I say it in entire kindness, but it is necessary as a part of my case—she writes with ignorance of grammar, and spelling, and punctuation, which makes it very difficult to read—the word “convenient,” for instance, is spelt with four or five letters; but there is no difficulty in your reading what is there; every word remains; it is written over in the usual way to indicate that it is not to be taken as a part of the letter. I could not see any reason for a fraudulent erasure, and then, what was erased was perfectly immaterial, and therefore I did not do anything about it. But an earnest effort was made to prevent its admission, and the learned judge, applying to it certain rules of evidence, which, under the circumstances in which the case then stood, he considered binding upon him, declared it inadmissible. You recollect the reason given by the other side for their objection, that the erased passage was the corner stone of their case, and the letter must have been mutilated to prevent a contradiction of the evidence offered by the libellant. Are you not astonished to find that in that erased passage there is not one word that throws the slightest light upon the question of the guilt or innocence of the respondent, and that you can read it perfectly well? And you will please to recollect that we admitted the very fact that is stated in the passage. They laid down the theory that the erasure indicated a conspiracy between Mr. E. O. Coburn and Mr. Dalton to conceal the fact that another meeting was agreed upon between these parties. Exactly, gentlemen, what we proved by our witnesses.

Now, gentlemen, there was a great outcry made that this erased passage was essential to their case, and his Honor supposed it would be essential to their case. Now, the curiosity is, that the moment they succeed in getting it ruled out, there is no evidence whatever offered on the subject of a

meeting on Friday night. It ceased to be of any importance whatever; we proved the fact, and they do not undertake to add anything to it nor detract anything from it. But they say, there is a conspiracy of the Coburns, one would suppose they were *Coburgs*, by the fear in which everybody seems to stand of them. Edward O. Coburn is a queer sort of a conspirator. The learned counsel says "give me John for testimony. Do not give me Edward for a conspirator; he is no man for a conspirator, he does not know how to do his work." But, says the learned counsel who opened the case for the respondent, "we are going to expose such conspiracy against herself and her friends, and the malignity of the man who should have been her brother, and who was her brother-in-law." He says there will be letters produced that will illustrate the dark conspiracy that was afterwards arranged. Where are the letters, and what do they illustrate? He says, "an evil spirit came to suggest evil thoughts, to darken his mind, to poison his heart; that they had meetings; there was a Rye House plot; they had meetings in a mysterious upper chamber, and then commenced the dark conspiracy against this young woman, her friends, and everybody who dared to defend her, including, of course, both the counsel—powder, I suppose beneath their feet, and all to be blown sky high, and that will be exposed, and you will be able clearly to understand it.

Edward O. Coburn, that "old serpent," according to the counsel, coiled round the heart of Frank Dalton, and completely changed his nature, but it turns out that they have never been very particular friends. Several of the witnesses say that he has said some hard things about Edward, and the learned senior counsel is delighted to find that he said, on one occasion, that Mr. E. A. Coburn made his house a hell. Does that tend to show that he had any great friendship for him? Where can you put your finger on any strong expression of friendship for him?

Gentlemen, who is this man who is going to conspire against this respondent and her family? Why, gentlemen, he is a

man who confessed in November, 1855, that he had taken by theft, from his father-in-law's safe, \$1700 in money. A pretty man for a conspirator! What good can he do anybody? What is he worth to any man as a conspirator? Why, Mr. John Gove had his hand right upon his throat. There was an indictment against him. That indictment is kept alive just as long as it is necessary to control Edward O. Coburn. Why, gentlemen, he is a man,—I am sorry to say in his presence,—he is a man of impaired, I do not know but you will say, ruined reputation. I confess I felt some pity for him when he made his statement,—and it crossed my mind that it was about as hard to make the use of the crime which Mr. Gove and his counsel made of it, as it was wrong in the witness to commit it. "It is excellent to have a giant's strength, but tyrannous to use it like a giant,"—they broke the bruised reed, and they quenched the smoking flax. I confess that I felt some sympathy for him. Perhaps that was wrong; perhaps we ought never to sympathize with a man who has committed a crime. He told the circumstances under which he did that act. They are sneered at. The learned counsel said that to assuage his domestic griefs he stole his father-in-law's money. Coburn did not say that. He said he had been extravagant, and was in debt,—you heard him say that,—poverty tempted him, and in a moment he "yielded to that tempter." He told you, gentlemen, he had an arrangement with Mr. Gove by which Mr. Gove was to pay him so much weekly for his own and his wife's board. Mr. Gove was away, and the money was not paid. As soon as it became known that he was connected with the Shawmut avenue affair, the public came down upon him like evening wolves, every man to whom he owed a dollar dunning him two or three times a day. Gentlemen, in a moment of despair, the fountain of his domestic life poisoned, he tried to explain it here, but he could not command the language which has been brought to bear to ruin him, but he used such as he had, and tried to explain it imperfectly to you. He acknowledged that he went to the safe, snatched a sum of money,—he never

knew how much,—never counted it,—and even after he had got it he hoped he should not be obliged to break into it, but he was so beset by his creditors that he was compelled to use some of it,—was discovered,—acknowledged it,—repaired it,—he has done wrong—it is the first chance he has ever had to explain it,—he is going West with the reverend gentleman who has appeared here upon the stand, who was his friend all the time he was in jail, and up to this hour, that gentleman who has been at his elbow, who has put good counsels into his mind, who has endeavored to help him build up a character again elsewhere,—I do not know with what success, for the eloquence of that argument of yesterday will go wherever he goes,—that argument, a copy of which, I am told, I do not know how truly, is to be found this morning in every letter-box in the city of Boston. Gentlemen, that argument will precede him, and I do not know that there is a place for him to rest the sole of his foot.

That is the conspiracy—a strange conspirator he! And what did he do? Why, upon the evidence, having conspired to ruin the character of that woman, every witness brought upon the stand is brought to show that he always spoke in her favor!

Now, gentlemen, show me a man to whom Edward O. Coburn, anywhere, before he was a witness upon the stand, spoke a cruel or a hard word against Helen Dalton. Show me the man, and we will talk about a “conspiracy!” But while they bring witnesses to show that he did not, I think they ought not to say much about it. But Mr. Gove denies it utterly; he has no belief that he conspired; he does not believe that he had any influence whatever in bringing that suit. He says he attributes it to the Daltons.

I left nothing imperfectly done in the way of presenting the evidence, that these two letters were in her possession, that she never denied or explained, or attempted to explain to anybody these letters, that she never suggested to anybody that she did not read them, or did not know all about them. I suppose that so much, at least, I can count upon every per-

son's understanding, and being satisfied upon. Even if the second letter were not read by her, it would not vary the case at all. She read the first; she answered it; and he replied to that. And even if she happened not to have read the reply, it does not alter the fact that she read the first and answered it, which is the only material fact here. If a person writes to you proposing a mercantile contract, and you accept it; and if he returns a reply to your acceptance, stating that he has received it; if you do not happen to receive that letter or to open it, it does not alter at all the fact that he proposed a contract to you and that you accepted it. So that, if there is a gentleman upon your panel, who, in spite of all the evidence, has still a lingering hope that she did not open that letter, still it cannot alter the fact that she read the first, and answered it, and that he replied to that, whether she read the reply or not. But as I had the honor to suggest to you yesterday, she never imagined, and never suggested to anybody, although pressed to the utmost by the force of the proof, she never so much as dreamed of suggesting that that letter was not opened and read. Then, she, having those letters, having the assignation suggested, leaving to him to settle the time and place of the assignation, he having made the appointment and she having kept it and acted upon it, having gone with him in pursuance of that assignation, as the last step, after all the "pauses" overcome, over this long road on a wintry day, to two taverns, staying just as long as they chose to stay, with nothing, as the old judges say, but their own will to stop them, interfered with by no accident on the road, at the houses, or anywhere, returning to Boston when they had completed all they intended to go for, and not a moment sooner than they desired to return, following the history along through these various stages, we were about going over together—for I trust that I may say that in every point in this case we are to knit together, we were about going over together the evidence respecting the subsequent confessions. If you could take with you and read over the cases in this Commonwealth and elsewhere, where divorces have

been granted, I am quite sure you would say that without any confession, if all stopped short of confession, upon the letters and upon the intimacy, upon the clandestine correspondence and secret acquaintance, upon the declarations of passionate love, upon the express declaration that he "must possess her or cease to think of her again," upon the declaration that he must go alone with her where he can "feed upon love," upon her acceptance of that proposition, upon their going alone together where he could "feed upon love," where he could "possess her entirely," interrupted by nobody, staying as long as they chose to stay, and returning only when they chose to return, upon the discovery, as all crime is discovered, by some accidental leaving out of the only two letters not destroyed—upon that evidence, according to the ruling of the Chief Justice in the case of *Dunham v. Dunham*, and according to all the authorities, my client would be entitled to his divorce. If there had been no confession, he would have been entitled to his divorce.

But she did make a confession, and that confession does stand upon the character of Mr. Dalton, and not alone upon his witnesses. Is not a confession probable? Is it not the great law of nature that we must confess? That the heart cannot contain its secret long! Are we not so made? Is the human frame and are the human faculties and senses mere mediums which can be controlled absolutely by the will? Not so. There is a law in our spirits which wars against the law of the will. It will confess. One of the greatest of the departed orators of America said in a famous trial, in a passage which I wish I could exactly repeat to you, that confession is a necessity of nature; there is no escape from confession but suicide, and suicide is confession. The heart o'erfraught may break, but it will confess.

Not only have we this law of nature making a confession probable, but we have facts in this case more important perhaps than the general law of nature, and I am glad to know that they do not war against it—facts to show why she should

confess. She had before fully confessed everything which she chose to confess. She had confessed improprieties; she had confessed the ring, the hand in the bosom, which she said was thrown back, the books, the rude solicitation; she had confessed all that on the 17th November, and he had forgiven it. That was perfectly understood between them. All the impropriety, bear in mind, all the flirtation, was understood, confessed, and forgiven. He had endeavored to wipe it entirely out from the tablets of his memory as well as from hers. He never returned to these things. You will observe that in all his subsequent correspondence, he never returned to them. His mind was not going over and over again what he believed and what she said was a flirtation, and those improprieties. He never recurred to them. He understood it; he had pardoned it. And if they two came together and recurred to the subject in a long interview of pain and tears, it was not for the flirtation, it was not for the improprieties. They had been confessed and forgiven. He had lived with her for weeks, and he had written to her affectionate letters from the jail. He had passed judgment upon it, regretted it, but had pardoned it, and it was all over. I know, I trust, something of the force of language in letters. I do not at all contend before you that the general expressions which she uses in her letters to him at the jail, about having done wrong, having erred, or even having sinned, are a confession of adultery. I do not think it would be just to her, nor reasonable, to say that they were, because I know that general expressions of sinfulness are true, and are felt by all who understand their own natures and the nature of men. Do I forget that hundreds of thousands of worshippers every Sunday pray for the pardon of God for themselves, "miserable sinners," that they deprecate the wrath of God and everlasting punishment? They all do it, all alike. But do they mean by that that they have stolen money? Do they mean that they have committed adultery? That they have worshipped false gods? That they have perjured themselves? They mean only to confess to the general sinfulness of the human heart; and I have no doubt

that is all she meant in her letters to her husband. And even if, as is possible, knowing in her own heart what she had done, she wrote thus in order that there might escape through that valve some of the penitence and consciousness of sin her husband was ignorant of, I do not suppose she meant he should so understand it; for you notice that in all these letters written to him in the jail, she takes care to qualify it. She says, I have sinned, but not criminally. There is not one letter written to him while he was in the jail which could be fairly understood as a confession of adultery. She takes care to qualify it. While she admits in pretty strong terms the wrongfulness of what she had done, she never so writes that he can understand it as a confession of adultery. And, therefore, whatever expressions those letters may contain, I do not contend that they should be understood, nor do I myself understand them to mean a confession of adultery.

There is wide difference between general confessions of guilt, and special confessions of guilt. I have noticed, and perhaps you have, that many men are very ready in confession of the general sinfulness of human nature, and urge it in pretty strong terms, but do you usually find them so very extravagant in confessing a particular sin of their own? Not usually. When you look at this letter you understand the difference between general and special confessions of sinfulness. I have endeavored to do justice to her, and to acknowledge that in all she said about sinfulness generally, she did not mean a confession of her guilt; but she says here, alluding to a past confession, and therefore not as explicit as if it stood alone, "Frank, I have done wrong. Young as I was, I was led astray. I was tempted and in a moment I yielded to the tempter. Oh, when I think of this, it seems as if I must tear myself in pieces. But the tempter is laid low in the grave; would to God he had laid low there before he did! Will you not take the erring one back to your heart, and say, come, child, your husband forgives you as he would wish to be forgiven?" Not as he does wish, to be forgiven, not as we all wish to be forgiven, but as he *would* wish to be forgiven had

he committed that sin. "Will you not say to her, 'he forgives you as he would wish to be forgiven, go and sin no more.'"

In the Gospel according to St. John, the 8th chapter and 11th verse, those words are written—"Go and sin no more"—of the woman that was taken in adultery. With her religious education she knew well the passage of Scripture and the use to which that form of words has been confined by the habit and traditions of eighteen hundred and fifty years, and out of the fullness of the heart the mouth spoke, "Go and sin no more," as if she had said, "Say to me, Frank, that you forgive me as you would wish to be forgiven had you done this, and say it because the Saviour of men said it to the woman taken in adultery." Then she goes on to say,—Let us go away; I will go anywhere with you to hide my shame.

I ask you to consider, gentlemen—for you know something of the heart and of the feeling with which a woman holds on to the last moment to her reputation for chastity—I ask you to consider, whether a woman, any woman, who knew she had been guilty of indiscretion, a woman who meant to confess the extreme of indiscretion, but not adultery, whatever a woman might say in mistaken language from the mouth—I ask you if any woman who meant to confess everything but adultery, could have been induced to put her name to that writing. A woman stands before you who says, "I will confess anything short of adultery, but that I will not. Word your improprieties, your indelicacies, your flirtations, as strong as you please, but it is not to bear the imputation of adultery." And you write. You say, "I was tempted; and in a moment I yielded to the tempter." Why, gentlemen, she would throw it from her on the instant. You add to it, "When I think of it I could tear myself to pieces,"—pretty strong language, to be sure, but let that go. "Will you not say to me, Go and sin no more!" Would she not start back from that instantly, and say, "What do you mean by putting such language into the letter? Does not all mankind know that these are the words the Saviour of men applied to the woman taken in adultery, and have they not always been

joined to that act?" Suppose a woman had come to any one of you, and given you her signature, and had told you, as a man of honor, "There, sir, write over that a confession strong as you please, but not to bear the imputation of adultery;" and you have written over it and brought it to her, "I was tempted and in a moment I yielded to the tempter,"—"Go and sin no more." I ask you if there is one on your panel who could have done it? Could you, as men of honesty and fairness, have written those words over a blank given to you to fill up for her? Suppose she had put her name there, and said to any of you, "Gentlemen, write over that a confession; say that I did, day after day, and week after week, flirt, act the coquette, receive presents, permit familiarities,—say anything, but do not convey the imputation of adultery." Would any one of you have written these words? Could you? Would any woman have signed it? But she selected her own language, and she signed it herself! And to whom? To her husband. And when? When he had told her that he was now proceeding against her for a libel for divorce. Why, gentlemen, she knew as she said at the close of the letter, "If you pronounce that awful word, I *must* submit."

Now, then, gentlemen, here is the substance of the libelant's case—all this line of conduct inconsistent with innocence and this confession. Here is the substance of his case. I should be very happy if I could leave it here. No doubt it has occurred to you, "It is a little singular that we heard so much from the other counsel about many things which Mr. Dana has not talked about at all." But if you had been in those seats a little longer, you would have learned that this is very often the case; you would have found that in a certain class of cases, the defense is very fond of saying a great deal about side issues, and all the more the less strength they have on *the issue*. It is of no manner of consequence whether Mr. Dalton has been led to these proceedings by public opinion, by the influence of friends,—the *due* influence of friends, the *due* influence of public opinion, or the *undue* influence of friends, the *undue* influence of public opinion. It is of no

consequence whether the act of abortion was committed or not; he does not claim a divorce for that, and nobody is on trial for that. If the prosecuting officers of the Commonwealth shall ever think it proper to investigate that subject by proceedings against Dr. Calkins or anyone else, it will be done.

If any of these parties implicated in these rumors desire an investigation by the tribunals it may be had. But we are not trying that; we are trying a different issue; it arises here collaterally; it is in the case, to a certain extent, necessarily, but I assure you, gentlemen, there are no persons who regret so much that it is necessarily in the case at all, as the libelant and his counsel; and the fact that it is in the case is one of the strongest grounds of hope that the libelee and her friends have, because the learned counsel may well say to them, "Here we will drive home upon that jury a side issue; peradventure they will come to think they have got to pass upon that, and they cannot find a verdict without slaughtering a whole family,—and that may stand in the way of a verdict." But, gentlemen, it is not so. That issue must be tried elsewhere, before a jury sitting in other seats, where all the evidence for and against, can be received,—and "God grant them all a safe deliverance!"

There is another witness, giving supplementary testimony, important for one or two things, but not necessary to our case. That is a woman who has fared pretty hard here—Mrs. Mary Hunter. The learned counsel says she is a stranger, and so she is. They have said by their questions and arguments that she is unchaste. They have said by their questions, arguments and insinuations, that she is the mother of a bastard. Perhaps it may be true, as was said in the argument, that she cannot tell who her own father and mother were; perhaps she was a foundling; perhaps, as the suggestion is, she has an unrecognized father,—all that may be true; but I do not know that it is. It is founded upon no evidence. It is but a breath of counsel, founded upon no evidence. She is a stranger; she is a Roman Catholic. I know it is said we do not like foreigners here. I do not know whether she is

Irish, Scotch, or English. But she is a foreigner and a Roman Catholic, and we do not like Roman Catholics. We are prejudiced against them. She has to meet that prejudice. We do know that she went to Mrs. Edward O. Coburn's to live as a wet nurse. Mrs. Coburn said she always supposed her to be a married woman. She knows nothing to the contrary. There is not a tittle of evidence here to the contrary. I never insulted her by asking her the question, and do not know how it is. She refused to answer the question when it was put to her; that is all.

I was rather struck with a certain fidelity of that woman. She knew by the questions put to her that they were calling her character in question. They asked if she had lived at a certain place. She said, "I have no objections to answering, but I won't." But it turned out afterwards that she was living in a place where the Gove family were willing to go. When I put the question, "Where do you live now?" she would not tell. She took the imputation of living in a house she was ashamed of acknowledging; and I remember noting a peculiar smile on the countenances of the learned counsel, as they said to themselves—she is caught; Mr. Dana has put one question too many; she is living in a brothel now. She would not tell, at the risk of her reputation, where she was living. It turned out that she was living with Mrs. Otis, the wife of one of our merchants, who had told her and obtained her promise not to bring her name into the case. She kept her promise, under circumstances which many persons would have broken it.

I confess that I do not see any great difference between attacking the character of Mary Hunter and attacking the character of any other female witness. She is a stranger; she is a foreigner; she is a Roman Catholic. She has no husband here, at all events, to stand by her. She has no friends. But then, for that reason, her reputation is her all. We know that all the time, from the time she left that house to this time, she has lived at none but respectable places. She has no friends! Hit her hard, gentlemen, both of you, she has no friends! If, after all that, you cannot believe anything she

says, throw it out, throw it out. I confess that it did not strike me so.

I do not see the motive, in the first place. Why should she wish to prove Mrs. Dalton's guilt? "What does she care about it? What is she to Hecuba, or Hecuba to her?" What had my client Dalton done for her, beyond giving her a chair, and perhaps dusting it for her? That was all he could do for her. Mr. Gove might do more, and is in the habit of doing more for his witnesses than Mr. Dalton is. Why should she take sides upon this question? If she is brought before you, a suborned, perjured witness, paid by Dalton somehow, why not testify to some purpose? She states, as the learned counsel says, a lame and imperfect confession. I do not pretend it is any more. It is far short of what it might have been, if it had been prepared for her. If it stood alone, I should not ask your verdict upon it, any more than upon the testimony of John Henry Coburn if it stood alone, or the testimony of Edward O. Coburn, if that stood alone. It amounts to this, that in friendly conversation with Mrs. Dalton, with whom she was very familiar, for it seems that Mrs. Hunter, being a nurse, lived upstairs, staid upstairs, to take care of the child, and came into very intimate confidential relations with all these women, sat sometimes by their board, for it is in evidence that at one time she was at the table—and to my mind it is not very strange that it should have been in the suddenness of conversation, that Mrs. Dalton said that Frank could not get a divorce for adultery because he could not prove it, that she looked all round and even under the bed, and there was nobody there. Does not that show that something took place there? Is her story improbable? It does not strike me so. And upon the testimony of a woman, against whom there is nothing but the tongue of the advocate, I am willing to believe it to be true, and I do not know why you should not.

There is another witness who testified to one particular fact; but I think the story itself is so incredible that I need not spend much time upon it. Mr. Wm. Richardson, the brother-in-law of Mrs. Dalton, tells us that after the 5th February he

had an interview with Mr. Dalton. What did Dalton go for? Dalton had broken every tie with that family upon the 5th February. Mr. Gove had recalled the dowry, with its interest. And what did this young man do? He remembered that for three weeks he had lived with his wife at Mr. Richardson's; and he went to Mr. Richardson's counting-room and paid three weeks' board for himself and his wife. He went there because his relations with the Gove family were broken and at an end. He went there to pay his board. In short, in order that there should not be one Gove living, or one brother or brother-in-law, who should say he had not acted the man of honor everywhere. He paid back all Mr. Gove's money, and he could even think of so much as three weeks' board for himself and his wife, when thus distressed, and went to Mr. Richardson's to pay it.

Mr. Richardson tells us that in that conversation Mr. Dalton said some most extraordinary things. He says that Mr. Dalton told him these things in the same breath; first that he was going on with his suit for divorce for adultery; second, that his wife was entirely innocent; and third, that she was entirely guilty, and he knew that. She had confessed adultery to him at Fera's saloon, and he knew that. She was perfectly innocent, and he knew that. And he was going to be divorced for the adultery, and he knew that. She had confessed it to him upon the 17th November, and had told him every day and every hour that he believed his wife innocent of it. Why, gentlemen, it would stagger the credulity of the most prejudiced and hostile mind. Mr. Frank Dalton, upon the day of the 17th November, took his wife directly to Mr. Richardson's, and said to them that although she had done a great deal, she was innocent of adultery; he continued there three weeks, boarding with them, and still believed her innocent of adultery. But now comes the change. Now comes a new state of things. Now comes the new judgment he has formed. Now comes the suit for divorce. Now comes the breaking of every tie. Now comes the recall of the dowry. And now he goes to Mr. Richardson and tells him these

things; first, that he was going on with his suit for divorce for adultery; second, that he knew she was innocent; third, that he knew she was guilty; fourth, that she had confessed adultery to him; fifth, that she had confessed it at Fera's saloon, Mrs. Coburn's back being turned for a moment, and the doors being open right out into the street; and sixth, that she had confessed it to him on the 17th November, since which time he had for three weeks believed her to be innocent.

There must be some misapprehension there, a complete misapprehension. Yet a single word will explain it. If Dalton told Mr. Richardson that she had confessed something less than adultery at Fera's saloon, it makes it all perfectly plain, and needs no other explanation. Mr. Richardson told you that he would not undertake to swear to words. Is it not evident that he misunderstood Mr. Dalton, and that all he meant to say was that she confessed something less than adultery? It is impossible to take any other supposition. Yet Mr. Richardson stands to it pretty manfully; and he says he told Mr. Dalton that he was a rascal. I think if he had told him that, he had better not have taken his money. He had the benefit of the transaction both ways. He took his money for his board, and then told him he was a rascal. He said that Dalton was not the man to strike him back. He was not. Richardson was perfectly safe. Mr. Dalton had struck one blow too many—perhaps the only blow he ever struck. He will bear a great many insults before he will strike a man. He has had a sad lesson. He did not know quite what he was doing when he struck those blows; but he did not do the harm it was thought he did, as the jury said. He has had a serious lesson not to strike a blow. I think Mr. Richardson must have been mistaken about that. I think he never said the word. I do not know whether even the chastened temper of Dalton would have borne it. I am not quite sure.

Then there is his letter again on the 9th January in which he says, in reference to the powder, "You say you will tell me another time; that will do as well." So it seems she had an interview with him, and did not tell him all; she

then wrote to him that she took a little medicine, and it did not do her any good. He is at a loss to know what she meant, and asks her what physician told her to take it. She says she will tell him about it another time, and he says that will do as well. That time never came; she never told him where she got the powder. Where did that powder come from?

That ends the correspondence in jail, except that we have not some of his letters; there must be a letter somewhere, or has been, where he alluded to that subject again. But it had passed; she had taken the powder, it had had no effect, it did not hurt her, it did not prevent her bearing a child, for she expected to have one the same as ever.

Now, gentlemen, that is something rather extraordinary. It throws an unpleasant light over the whole subject. And let me say to you another thing: that when he presses her about that powder, and asks her to tell him where she got it, and she puts him off and says, "I will tell you another time," there was not an intimation that it was nothing but a little composition powder which her mother gave her. How ready was that answer, "Powder! Why, it was only a little composition powder which my mother gave me." But "I will tell you another time where it came from; no physician told me to take it; I took it; it has had no effect; I will tell you another time where I got it." But that time never came.

Gentlemen, they say that there were several cases of threatened miscarriage; that three several times she was in danger of miscarriage, known to her mother. Look at that full, confidential correspondence, and show me an intimation to her husband that she had been in danger of a miscarriage. Why, gentlemen, if she had gone home from him with the story that she had been in danger of a miscarriage, what argument could she have used to him more effectual than to say, "Frank, you must give this up; you must come back to me; last night I was in peril with this child"—which he believed to be his—what argument could she have used so effectual, and so told him everything? She told him every cold she had, every headache she had, every hour's sleep she lost, but there is not

one intimation that she had been in danger of miscarriage. I cannot understand how, in December, in January, and in February she should have been in danger of miscarriage—twice while he was in jail, (afterwards when he was out of jail he did not expect a communication)—and there should not have been a word to him upon the subject. I cannot understand it.

But, gentlemen, I do not mean to press this matter an atom further than it is entitled to go, but I want my client to stand clear in this business. He has done all he can to prevent publicity during this whole transaction; he has done all he can to prevent anything being done any farther on the subject of this transaction; but he had these letters, and there is no explanation, not a word about miscarriage; he then comes out of jail and is not told where the powders were got; he knows from these three letters, as you and I know, that they were taken for the purpose that she says, but notwithstanding that she still expected to have her child. Then not long afterwards he hears that there was a miscarriage. Well, gentlemen, would he not immediately refer to those letters about the unexplained powder which she said had had no effect, and would not his fears and his apprehensions have been excited?

Now when we come to the examination of Mrs. Edward O. Coburn she has something to say about it, and she represents it as though Mrs. Dalton was in constant fear of miscarriage from the 11th December up to the time it happened. She says so in all her answers to the interrogations, that Mrs. Dalton was in great danger several times, and yet we do not find her so much as intimating it to her husband. Then it is a little extraordinary to me that this young woman, with her first child, her husband separated from her, her father away, in danger all day Friday, as Mrs. Emerson tells you, and all day Saturday, as Mrs. Coburn and Mrs. Gove tell you, and all day Sunday, as they tell you, and all day Monday, as they tell you, her pains gradually increasing up to 11 o'clock on Monday night, no physician should be called or even so

much as spoken of. I do not quite understand it. I can understand a sudden sickness, but so long, so dangerous as miscarriages are, to have continued in pain and peril three days and yet not so much as a suggestion to call a physician, is a little singular.

Now then, gentlemen, we will come to the evidence of the physicians on the subject. They say—Dr. Storer and Dr. Clarke—that full baths or hip baths are taken for that purpose, that various kinds of medicines are taken, and that operations are performed, but if operations are performed and pains begin it is an unnatural state of things, and the birth will take place in about three days. Now, pains and sickness lasting through three days and ending in a premature birth, are indications of something more than a natural miscarriage. Now, we have all these probabilities—because I do not want to rest this case upon any evidence of witnesses you think you ought to disbelieve in the least—we have all these probabilities and all these connected facts, which I must confess I cannot see how you are to reconcile with the notion that nothing was done or attempted, or with her letters.

Then you have the testimony of Mary Hunter, who says she did take hot baths and hot drinks, and that she got some medicines from Dr. Lincoln's. Mr. Gove struggles to show she was wrong, but they were got there—the recipes were returned to the house. Mary says that Mrs. Gove told her—which Mrs. Coburn corroborates—that they were given to bring the child forward, and that she so understood it. And she says, at one time matters going on slowly, Helen took a hot bath, and she said she would be parboiled but she would bring it forward. Mary was a confidential person, and necessarily in the room. About the birth there was no secret, because they called it a miscarriage.

Margaret Ware down in the kitchen did not know it. She did not know the child had been taken to the physician; and what shows that there is nothing extraordinary in that, she never heard there had been a danger of miscarriage till that night. Is not that strange—that Margaret Ware, when this

woman had been three times in danger of a miscarriage should never have heard it? If it is not, it is no more strange that they should not have revealed to her the earlier part of this transaction.

Then, gentlemen, there was a miscarriage, assisted or procured or forced or something. Now is the curiosity. Why, if there was nothing in that, should Mr. Dalton or anybody else have tried to introduce it or make it up? Why, gentlemen, it is an incumbrance in the case; every lawyer will tell you so. Nobody could ever think of making such a thing up to put into this case. Does it tend to show her guilt? I do not suppose it does, but then there is this to suggest to you: If her husband had repudiated her, if every link was broken, this dowry taken back, this interview had and everything at an end, that furnished a pretty strong temptation to try again what she tried when her husband was in jail—some attempt to relieve herself. The fact of the marriage in June and the child conceived in October, about the time of the intimacy with Sumner, though the particulars might be known to the family and even the husband, could not have relieved her from public imputation. If even the husband knew that the conception took place much earlier than the acquaintance, yet it would not relieve her from the public imputation. Married in June, both young, he well and strong, the child conceived about the first of October, the acquaintance with Sumner beginning as Mrs. Fera says about the middle of September, whatever she or her husband might think, yet the public could not be entirely set right about it. It furnishes a motive beside the other motive that many women have, who are under no infatuation, which has influenced so many women in the highest position, women of wealth, of education, of moral culture in this city to do the same thing again and again, some of whom we know have lost their lives in doing it.

Gentlemen, do not let us be led astray to side issues in this case. Let us come to the main question. And now I trust I may say that I am about to relieve you. But I can hardly leave this case, my anxiety is so great lest through some fault

of mine, there may be a man on that jury that I may have prejudiced against me or my client or our cause or left some point, step or link in the chain where your mind is not satisfied. The law does not authorize jurors to sit in their seats and say, "Mr. Dana just tell me this and tell me that." I wish it were so; I wish I could divine some one spot where the juror might say to me, "I want this explained." But we must stop somewhere, we must assume something, and I must let this case go, imperfectly as it has been presented.

Let us come back, then, to the issue. She promised to keep herself from all others to him alone. He says she has not performed that contract. He asks you to say that she has not. The contract is to be dissolved. She is not to be tried as a criminal or condemned as a criminal. The temptation, the motive, the suddenness, the youth, all go to her credit. It is not a question of forgiveness, it is not a question of extenuation, it is a simple question of fact. And gentlemen we do not of course produce you direct evidence to that fact. That were impossible. These things are done in secret; it is the strong circumstances that lead you to the door of truth, and being there it is your duty to enter.

He says in her own language she admits that she was tempted; he knows that she was young; he knows that it was the sin of a moment, and he judges her accordingly. But it is none the less his right that the contract shall be dissolved, that she shall not be the guardian of his honor and his peace of mind, the head of his house, of his family, to bear children to his name. You are to pass upon the facts. He says, "I know you yielded in a moment of temptation, I judge you accordingly, but because you yielded this contract must be broken. I will go as far as the farthest to sustain your reputation, anywhere and everywhere, against everything, but the absolute final truth; I will join with this community in throwing the shield of forgiveness and forgetfulness over the transaction; I will forgive you; I do forgive you; I pray that you may never sin again; go, sin no more!"

Vindicate, also, gentlemen, the jury trial. Let it not be

said or supposed that the eloquent Greeks and super-subtle Venetians have everything their own way, but that the juries look the circumstances in their face, act upon their own judgment, and pass accordingly. If the jury is to try these cases, let this great test case be met like men. Do not let it be said or thought that juries will not find a verdict in a cause of this sort against a woman. I know that is said. I know it is believed. I know it is relied upon, and I felt it my duty to warn my client that there is that great danger. It is hard for men to find a verdict against a woman—that is the fear—twelve men will not find a verdict against a young woman. Gentlemen, vindicate jury trial; no matter on which side the truth may fall, follow it. You know, gentlemen, that you are not to expect, in the language of the Chief Justice of this Commonwealth, direct proof, but we have produced to you all the circumstances that make up the category. We have shown you secret clandestine correspondence, hidden from the husband, discovered by accident and the rest of the correspondence destroyed. We have shown you the secret acquaintance, concealed from the husband, concealed from the sister, concealed from all—an acquaintance which there was no reason for concealing unless guilt went with it. We have shown you passionate declarations received—not rejected but responded to and cherished. We have shown you that her letters to him were all that he could wish and were full of all he could wish, and we have shown you what he wished. We have shown you that he came to a perfect understanding with her,—that he said to her, “I must possess you entirely or never think of you again,” and then how practical he becomes and says, “We must be alone for this, of course; name the time and place;” and she answers it, and there the last step is taken. She knew what step she took, it was perfectly intelligible. She did not “pause,” she yielded. She ought to have stopped, but very many women fall just there. She expected it, she made the appointment, she made the assignation, she left it to him and he assigned it, and he says “let us ride out together.” They rode out together in a wintry day in the latter part of No-

vember, with no temptation but the end of the ride; they went to the first tavern, and there she says he made insulting proposals to her. Gentlemen, it is too much for her to expect that the Court will stop short in its conclusions at the very spot where she chooses to stop short in her narrative. Then they went to another tavern—the two alone together—and they staid just as long as they chose to stay together; there was nothing but their wills to stop them, and what was his will? Gentlemen, what was his will? He went out on that ride to feed upon love; he went out in a cold November day; he went out to be alone with her expecting at the end of the ride, to feed upon love; he went out there to possess her entirely, as she told him he might; they stayed as long as they pleased at the second tavern; there was nothing but their wills to stop them, and what was his will? What interrupted them—what broke it off? Nothing. They stayed as long as they pleased—they came back when they chose. They came back. The letters were all destroyed, but two, unfortunately for her, remaining, and they were discovered, and so Providence enables us to discover guilt.

And then, gentlemen, she admitted all that she could admit short of adultery. He forgave her the whole of it; like a good, kind, honorable, credulous man, he forgave it all. He was blind, gentlemen, he was blind. He was with her friends, and they blinded him—she blinded him. He forgave all. But by and by came a further development of two other letters. Then came a loss of confidence on this point and on that point. Then came those rays of light that lighted up the whole picture in his mind; and then, on the 5th February, he cuts the last cord. He says, "It is all over; I forgive you. I hope you may never sin again, but no longer can you be wife of mine." They understood it. She finds all is lost; she finds that protestations of innocence are no longer of any value; and then she takes to the confession. She makes a confession. I do not know that she confessed all—no one will know—but she confessed enough.

She knew that he knew all about it. He had seen the letters,

he had come to a knowledge of her guilt, and she then and there confessed it. The next day she writes him, imploring him to forgive her, saying "Frank, can you forgive me?" He had forgiven her, months before, everything but adultery.

"Frank, can you forgive me?" Forgive what? There was nothing to forgive but adultery. "Frank, must you speak that awful word? If you do, I must submit." Could any woman that was not guilty have said that? But the appeal is in vain. Then her father hurries down to him with the offer of ten thousand pieces of silver and credit and banishment, and he rejects it all. She says in the only plea that she can offer, "I was tempted, and in a moment I yielded to the tempter."

Upon all this evidence, gentlemen, vindicate the right of my client; pass no hard judgments upon any man, still less upon any woman. Forgive, extenuate, but at last maintain the right and security of the husband. He has a right which this tribunal must vindicate. The confession and all stand on his character. You have before you a pure minded, honorable young man. Vindicate his right. He has a right that this tribunal was made to vindicate. When you took your oaths here you held yourselves out, in the language of the law, to be "good men and true." You have a duty to perform that it requires MEN to perform. No matter what persons acquainted with the subject, who have read a little here and a little there may say, you have a duty to perform. I know it is a painful duty. I know that a weak-minded man will shrink from it—will try to find refuge in doubts; but I hope, I know, there is the brain, the manliness, to come up to the evidence and say, these circumstances, these facts, this confession, this language, are clear.

I know you may err; you may err in anything. "To err is human." But a judgment must be found upon a "fair satisfaction," as in a civil cause; and if you do that, you are not responsible further; if you do not do that, you are. How is it with all civil causes that juries decide? You say, "I may be mistaken, either way;" but you must decide upon the preponderance of evidence, to your "reasonable satisfaction."

If you do that, you are not responsible; if you do not do that, you are.

Gentlemen, I make no appeal to your sympathy, for my client. You know where the failure to obtain a verdict, leaves him. He repudiates the proffered kindness of the counsel for the respondent, who would intimate that nothing but this suit prevents him from "rushing to her arms."

Gentlemen, that is simply the word of the advocate; and it rests upon nothing. He never will take her back; he never can. He must live forever responsible for her, everywhere, and yet she never his wife—"a man forbid" as long as he shall live. There is the result to him. But, gentlemen, do not find your verdict with any reference to the effect upon one or the other. But say whether, according to the rule of law laid down to you, you are not "satisfied." Good men and true, it does require even a clear head, a manly and firm mind to find a verdict against the woman, where the evidence requires it. Gentlemen, do that, and show yourselves to be men, good and true.

THE CHARGE OF THE COURT.

JUDGE MERRICK. Gentlemen: This is, as has been remarked, the first instance, under a recent statute of this Commonwealth, in which a question of this kind, in a process of this kind, has been submitted to a jury. Before this statute was enacted, this question would have been heard and determined alone by the Court. The Legislature has thought fit that, in a question of so great magnitude, a question in relation to a civil contract, the question of fact should, in reference to a class of questions of this kind—like questions of fact in relation to every other species of contract—be submitted to the consideration of a jury. That is the law of the land; its expediency is not to be inquired into here, or if it were, who would hesitate to say that it is a fit and proper question to be submitted to a jury, and a very fit and proper question upon which the responsibility of the Court should be relieved? Be it as it may, the process was commenced, the proceedings

have gone on, and the trial takes place exactly according to the law of the land, and this therefore can constitute nowhere a ground of complaint. The issue between these parties is simply this—has Helen Maria Dalton, the respondent, committed the crime of adultery? And upon this issue your verdict will be given, in the simple words—“We find for the libellant,” or, “We find for the respondent,” as your judgment is formed, upon the question submitted to you.²⁶

There is one other piece of evidence of a most interesting character, certainly. It is this letter of the 26th February, written the day after the interview took place between Mrs. Dalton and her husband, when Mr. Coburn has testified that she made a confession; and it is said in this letter Mrs. Dalton acknowledges her guilt, acknowledges that she had made a confession—the letter of February 26.

This letter is said to be a confession. What is the meaning of this letter? The strong passage in it which has been relied upon is this: “Young as I was, I was led astray. I was tempted, and in a moment yielded to the tempter.” What is the meaning of these expressions, which have been dwelt upon with so much force? If, as the learned counsel suggests, you had been called upon to pen a confession of adultery in modest terms, this letter would express it. But on the other hand if you were called upon to pen a confession of anything but adultery, this letter would express it. It is figurative language. It is consonant with what, according to her own statement, she intended to express. I should not hesitate at all to say that if Mrs. Dalton had said to her husband, “Frank, I did once submit to the embraces of Mr. Sumner, and commit adultery with him,” I have no doubt that she would have written, just such a letter as this, and that would be its meaning; but if she had said to him, as she always said from the 17th November down to the 25th Feb-

²⁶ The Judge first instructed the jury upon the question of burden of proof and circumstantial evidence and then reviewed the evidence of the witnesses as to the adultery and the alleged confession.

ruary, "Frank, I did wrong, very wrong, I was led astray, not to adultery, but to a secret intercourse and a clandestine correspondence with him. I was wrong. I was doing that which cannot be justified. I say to you that which I did say to Abby Dalton and William Dalton, when they asked me how I could explain my conduct, I say that I cannot explain it; I cannot justify myself;" if she had said that, then it would be equally evident that when she said she was "led astray" and "in a moment yielded to the tempter," the language was figurative, which she knew her husband would perfectly understand. And when she says "the tempter is laid low in the grave," it is to be interpreted in the light of the correspondence of the previous evening. If there is proof before you, then, that she had confessed, interpret it in that way. If there is no proof before you that she had confessed, then interpret it in that way, that in the confessions of this letter she but reiterates the confessions of the others.

Then it is said that the expression, "Go and sin no more," was a confession of guilt. Judge you whether she meant to attach to it the meaning which it had when it was pronounced by Him who "spake as never man spake," or whether she used in reference to her guilty and dishonorable course of life. When she desired to throw herself into the arms of her husband, and saw in that meeting "a bright hope and prospects of a happy future," was it the confession of an adultery which she had never confessed before, which shone with a new light upon her future path? Was that the basis upon which she predicted an agreement between them, when they were to meet a day or two afterwards at this Richardson's? Interpret it in the light of the evidence.

There is still one piece of testimony in favor of the libelee, much relied upon by her counsel, which deserves your attention. It is the letter wrote to him upon the 16th March, a day or two after the libel was filed, and of course a fortnight or three weeks after the time when this confession was supposed to be made, which she begins by saying—"You have accused me of a crime of which I am not guilty." If she had confessed

her crime on the 25th February, you are to judge whether she could have written this letter telling him that she was not guilty of crime.

Gentlemen, I have submitted to you such observations as I think necessary. You will consider your verdict, and if you believe that, in view of all the evidence, the adultery was committed, you will find for the libelant; but if not, you will find for the respondent.

THE JURY DISAGREES.

The Court opened this morning at ten minutes past nine. The area of the Court House was very much crowded. At twenty-five minutes past nine a note was handed to the Judge by the officer attending the jury and he was directed to bring them into court. They took their seats.

JUDGE MERRICK. Gentlemen: I understand from your communication that after a long and earnest investigation of the evidence in the case before you, you have been unable to agree upon a verdict. Is it so?

The Foreman: It is so.

JUDGE MERRICK: You think then that there is no prospect whatever of agreeing upon a verdict?

The Foreman: There is no such prospect, your Honor.

JUDGE MERRICK: The Court regrets it exceedingly indeed, but does not wish to subject the jury to any further labor in connection with the case. You are, therefore, discharged, gentlemen.²⁵

²⁵ The jury stood ten for the libelant and two for the libelee.

THE TRIAL OF CHARLES B. REYNOLDS FOR
BLASPHEMY, MORRISTOWN, NEW JERSEY,
1887.

THE NARRATIVE.

One Charles B. Reynolds, described in the newspapers of the day as an "ex-Reverend", but at the time a missionary, lecturer and writer on free-thought, had been going from town to town lecturing, preaching and distributing his writings on his favorite topic. His meetings seem to have been well attended and were as a rule orderly. But at one in Boonton, in Morris county, he was attacked by a small mob, missiles thrown at him, his tent pulled down and himself compelled to flee from the place. For this he brought an action against the town, which retaliated by prosecuting him for disturbing the peace. But he continued his labors in the County-seat, Morristown, where he was indicted by the grand jury under an old statute against blasphemy.

The trial would have attracted little public notice had not Robert G. Ingersol, the great orator and advocate, appeared as his counsel. When the evidence was closed, Colonel Ingersoll made a great speech lasting part of two days. But all his eloquence was wasted on the New Jersey jury which in an hour returned a verdict of guilty.

THE TRIAL.¹

*In the Morris County Court, Morristown, New Jersey,
May, 1887.*

HON. FRANCIS CHILD,² Judge.³

May 19.

Charles B. Reynolds had been indicted by the grand jury under the statute that provides: "Any person who shall

¹ *Bibliography.* Trial of C. B. Reynolds for blasphemy, at Morristown, N. J., May 19th and 20th, 1887. Defense by Robert G.

wilfully blaspheme the name of God by denying, cursing or contumeliously reproaching His being or Providence, or by cursing or contumeliously reproaching Jesus Christ or by profane scoffing at or exposing them or either of them to contempt or ridicule, shall be guilty of a misdemeanor". Comp. stats. N. J. 1709-1810, p. 1770, sec. 73.

There were two indictments, one charging that the blasphemous language was uttered in Boonton in said county and the other that the following words had been written by the defendant, printed in a pamphlet and circulated by him in said County:

"The Bible describes God as so loving that He drowned the whole world in His mad fury, because it was so much worse than He (knowing all things?) ever supposed it could be. An all-wise, unchangeable God, who got out of patience with the world which was just what His own stupid blundering had made it and knew no better way out of the muddle than to destroy it by drowning! The Bible says His people made God jealous, provoked Him to anger, and now He will raise the mischief with them, for he declares His anger burns like hell. He will destroy them all 'were it not that I fear the wrath of the enemy.' The Almighty God afraid of His enemies! Can the human mind conceive of more horrid blasphemy? Can even a New Jersey Christian believe such stuff was ever inspired by a God? The Old Testament records for our instruction in morals the most foul and bestial instances perpetrated by God's own pet saints, and the New Testament endorses these old wretches as examples for all good Christians to follow.

"Now reader, take time and calmly think it over. A Jewish girl becomes the mother of God Almighty—the mother of your God. The child of this young Jewess was God. Christ is God. God cried and screamed, squealed and kicked; God flung about his little arms; God made aimless dashes into space with his little fists; God stared foolishly at his own little toes; God smiled when he was comfortable and howled when pricked by a nasty pin; God was nursed at Mary's breast. * * * God lay in a cradle and was rocked to sleep; God was quite sick when cutting his little teeth;

Ingersoll. Stenographically Reported by I. N. Baker, and Revised by the Author. C. P. Farrell, Publisher, New York City. 1888. Morristown newspapers of the day.

* CHILD, FRANCIS (1842-1914). Born Morristown, N. J. Studied law with Theodore Little and admitted as attorney, 1867 and counselor, 1870. Practiced law in Morristown, 1867-1878; Judge Court of Common Pleas, 1878-1893. Judge Circuit Court 1893.

* With him sat Judges Munson and Quimby.

God caught the measles, mumps, whooping cough and scarlet fever; God had learned to walk, often tumbled down, bumped his forehead and made his little nose bleed; God was spanked when he was naughty."

*Augustus W. Cutler*⁴ for the State, *Robert G. Ingersoll*⁵ for the defendant.

The Defendant pleaded *Not Guilty*.

The Trial began today.⁶

The empaneling of the jury was then begun.

Jacob Ogden was asked if he had ever heard of the case, if he had formed or expressed any opinion as to the guilt of the defendant; if his mind was such that he could not give the defendant a fair and impartial trial. He answered in the negative. *J. E. B. Stiles*, asked if he belonged to any church, said he did, to the Presbyterian. *Isaac N. Beach* belonged to the Methodist Church, but thought he had no prejudices that could not be removed by argument. *Lewis Boing* didn't belong to any church but had prejudices which could be removed by evidence but not by argument. *A. B. Coughlin* belonged to the Catholic Church, but had no prejudices. *Francis R. Davis* was a member of the Presbyterian Church less than a year; his church had taken no special action in the case; *Paul H. Mandeville* was accepted. *George Schuyler* belonged to no church. *James Linehen* said he was 65 and was excused. *Thos. F. Grimes* had a fixed opinion which was such that it would require good evidence to change it. *Charles Genung* had a fixed opinion which would require a great deal of evidence to overcome. He had been a member of the Presbyterian Church

⁴ CUTLER, AUGUSTUS W. (1827-1897). Born and died, Morristown, N. J. Admitted to practice as attorney, 1850, as counselor 1853; Prosecutor of the Pleas, 1856-1861; President of Board of Education 1870; member Const. Conv. of N. J. 1873; state Senator 1871-1874; member 44th and 45th Congresses, 1875-1879.

⁵ INGERSOLL, ROBERT GREEN (1833-1899). Born Dresden, N. Y.; son of a Congregational minister, studied law and admitted to bar and began practice at Shawneetown, Ill. 1854. Removed to Peoria, 1857. Was a cavalry officer in the civil war. Atty-Gen. (Ill.) 1866. Became a platform, political and bar orator, but became best known by his lectures and writings against Christianity and the Bible. Author of "The Gods", "Some mistakes of Moses", "Ghosts", "Complete lectures" and "Prose Poems". Died at Dobbs Ferry, N. Y.

⁶ The faces of many well known people in the County were noticed throughout the room including those of a number of clergymen. The liberals of Boonton, supporters of Reynolds, were also out in force, and in their delegation were eight or ten women.

25 years. *Michael Rourke* was a Catholic, he had no prejudices. *Eugene Buchanan* had expressed an opinion which was not so fixed but that it could be changed by evidence. *Leo DeHart* was not connected with any church and could give a fair trial. *Horace L. Dunham* had no prejudice. *Geo. W. Minard* had an opinion from what he had heard; was a member of the Methodist Episcopal Church, but had no prejudice that would prevent him giving a man a fair trial. *Lemuel Pierson* had no prejudices. *Benjamin Flarty* knew but little about the case and had no prejudices. *John McTiernan* was a Catholic; he had no opinion that evidence would not remove.

The following men were then sworn: A. B. Coghlan, Paul H. Mandeville, Michael Rourke, Eugene Buchanan, Geo. DeHart, Lemuel Pierson, Benjamin Flarty, John McTiernan, Lewis Boing and three others.

Mr. Cutler told the jury that the defendant was charged with having circulated in Morristown certain papers alleged to be blasphemous. The particular language so charged was contained in the indictment which he would read to them. Upon proof of these facts, the State would ask for a verdict of guilty.

THE EVIDENCE.

John W. Babbitt said he received a document from Reynolds which was offered in evidence and contained language set out in the indictment.

Winfield West: Am a Morristown bill-poster; saw Reynolds circulating a pamphlet like the one put in evidence. Found he had no license to circulate such things and stopped him. Then Reynolds tried to employ me to circulate them in the schools and elsewhere, but I refused to do so.

Thomas Maley: Am a member of the Morristown Common Council; saw Reynolds circulating the pamphlet about the town and asked him if he had a license to distribute such pa-

pers. He insisted on putting them out; told him if he did I would arrest him. Reynolds gave me one while we were talking.

Benj. M. Van Cleve: Reynolds left several of the pamphlets in the store where I was at work.

M. F. Lower: Saw Reynolds hand Mr. Maley a pamphlet and leave one on Sharkey's news stand; thought the one I had was burned, because my wife did not want it around the house.

Charles Vanderhoof: Reynolds handed me a pamphlet like the one shown.

Willis H. Dutton, George L. Clark, David L. Fox, Charles

Kersting, Mills Loree, John Naughton, Lewis Armstrong, and Fred Pierson testified to seeing Reynolds distributing the pamphlets.

P. J. Sharkey: Am a baker. Defendant left one of these

pamphlets at my store. I read some of it.

Mr. Ingersoll: You have made just as good bread since have you not? Yes, sir.

The Defendant called no witnesses.

MR. INGERSOLL'S SPEECH TO THE JURY.

Gentlemen of the Jury: I regard this as one of the most important cases that can be submitted to a jury. It is not a case that involves a little property, neither is it one that involves simply the liberty of one man. It involves the freedom of speech, the intellectual liberty of every citizen of New Jersey.

The question to be tried by you is whether a man has the right to express his honest thought; and for that reason there can be no case of greater importance submitted to a jury. And it may be well enough for me, at the outset, to admit that there could be no case in which I could take a greater—a deeper interest. For my part, I would not wish to live in a world where I could not express my honest opinions. Men who deny to others the right of speech are not fit to live with honest men.

I deny the right of any man, of any number of men, of any church, of any state, to put a padlock on the lips—to make the tongue a convict. I passionately deny the right of the Herod of authority to kill the children of the brain.

A man has a right to work with his hands, to plow the earth, to sow the seed, and that man has a right to reap the harvest. If we have not that right, then all are slaves except those who take these rights from their fellow-men. If you have the right to work with your hands and to gather the harvest for yourself and your children, have you not a right to cultivate your brain? Have you not the right to read, to observe, to investigate—and when you have so read and so investigated, have you not the right to reap that field? And what is it to reap that field? It is simply

to express what you have ascertained—simply to give your thoughts to your fellow-men.

If there is one subject in this world worthy of being discussed, worthy of being understood, it is the question of intellectual liberty. Without that, we are simply painted clay; without that, we are poor miserable serfs and slaves. If you have not the right to express your opinions, if the defendant has not this right, then no man ever walked beneath the blue of heaven that had the right to express his thought. If others claim the right, where did they get it? How did they happen to have it, and how did you happen to be deprived of it? Where did a church or a nation get that right?

Are we not all children of the same Mother? Are we not all compelled to think, whether we wish to or not? Can you help thinking as you do? When you look out upon the woods, the fields,—when you look at the solemn splendors of the night—these things produce certain thoughts in your mind, and they produce them necessarily. No man can think as he desires. No man controls the action of his brain, any more than he controls the action of his heart. The blood pursues its old accustomed ways in spite of you. The eyes see, if you open them, in spite of you. The ears hear, if they are unstopped, without asking your permission. And the brain thinks, in spite of you. Should you express that thought? Certainly you should, if others express theirs. You have exactly the same right. He who takes it from you is a robber.

For thousands of years people have been trying to force other people to think their way. Did they succeed? No. Will they succeed? No. Why? Because brute force is not an argument. You can stand with the lash over a man, or you can stand by the prison door, or beneath the gallows, or by the stake, and say to this man: "Recant, or the lash descends, the prison door is locked upon you, the rope is put about your neck, or the torch is given to the fagot." And so the man recants. Is he convinced? Not at all.

Have you produced a new argument? Not the slightest. And yet the ignorant bigots of this world have been trying for thousands of years to rule the minds of men by brute force. They have endeavored to improve the mind by torturing the flesh—to spread religion with the sword and torch. They have tried to convince their brothers by putting their feet in iron boots, by putting fathers, mothers, patriots, philosophers and philanthropists in dungeons. And what has been the result? Are we any nearer thinking alike to-day than we were then?

No orthodox church ever had power that it did not endeavor to make people think its way by force and flame. And yet every church that ever was established commenced in the minority, and while it was in the minority advocated free speech—every one. John Calvin, the founder of the Presbyterian Church, while he lived in France, wrote a book on religious toleration in order to show that all men had an equal right to think; and yet that man afterwards, clothed in a little authority, forgot all his sentiments about religious liberty, and had poor Servetus burned at the stake, for differing with him on a question that neither of them knew anything about. In the minority, Calvin advocated toleration—in the majority, he practised murder.

I want you to understand what has been done in the world to force men to think alike. It seems to me that if there is some infinite being who wants us to think alike, he would have made us alike. Why did he not do so? Why did he make your brain so that you could not by any possibility be a Methodist? Why did he make yours so that you could not be a Catholic? And why did he make the brain of another so that he is an unbeliever—why the brain of another so that he became a Mohammedan—if he wanted us all to believe alike?

After all, may be Nature is good enough, and grand enough, and broad enough to give us the diversity born of liberty. May be, after all, it would not be best for us

all to be just the same. What a stupid world, if everybody said yes to everything that everybody else might say.

The most important thing in this world is liberty. More important than food or clothes—more important than gold or houses or lands—more important than art or science—more important than all religions, is the liberty of man.

If civilization tends to do away with liberty, then I agree with Mr. Buckle that civilization is a curse. Gladly would I give up the splendors of the nineteenth century—gladly would I forget every invention that has leaped from the brain of man—gladly would I see all books ashes, all works of art destroyed, all statues broken, and all the triumphs of the world lost—gladly, joyously would I go back to the abodes and dens of savagery, if that is necessary to preserve the inestimable gem of human liberty. So would every man who has a heart and brain.

How has the church in every age, when in authority, defended itself? Always by a statute against blasphemy, against argument, against free speech. And there never was such a statute that did not stain the book that it was in, and that did not certify to the savagery of the men who passed it. Never. By making a statute and by defining blasphemy, the Church sought to prevent discussion—sought to prevent argument—sought to prevent a man giving his honest opinion. Certainly a tenet, a dogma, a doctrine is safe when hedged about by a statute that prevents your speaking against it. In the silence of slavery it exists. It lives because lips are locked. It lives because men are slaves.

If I understand myself, I advocate only the doctrines that in my judgment will make this world happier and better. If I know myself, I advocate only those things that will make a man a better citizen, a better father, a kinder husband—that will make a woman a better wife, a better mother—doctrines that will fill every home with sunshine and with joy. And if I believed that anything I should say today would have any other possible tendency,

I would stop. I am a believer in liberty. That is my religion—to give to every other human being every right that I claim for myself, and I grant to every other human being, not the right—because it is his right—but instead of granting I declare that it is his right, to attack every doctrine that I maintain, to answer every argument that I may urge—in other words, he must have absolute freedom of speech.

I am a believer in what I call “intellectual hospitality.” A man comes to your door. If you are a gentleman and he appears to be a good man, you receive him with a smile. You ask after his health. You say: “Take a chair; are you thirsty, are you hungry, will you not break bread with me?” That is what a hospitable, good man does—he does not set the dog on him. Now how should we treat a new thought? I say that the brain should be hospitable and say to the new thought: “Come in; sit down; I want to cross-examine you; I want to find whether you are good or bad; if good, stay; if bad, I don’t want to hurt you—probably you think you are all right,—but your room is better than your company, and I will take another idea in your place.” Why not? Can any man have the egotism to say that he has found it all out? No. Every man who has thought, knows not only how little he knows, but how little every other human being knows, and how ignorant after all the world must be.

There was a time in Europe when the Catholic church had power. And I want it distinctly understood with this jury, that while I am opposed to Catholicism I am not opposed to Catholics—while I am opposed to Presbyterianism I am not opposed to Presbyterians. I do not fight people,—I fight ideas, I fight principles, and I never go into personalities. As I said, I do not hate Presbyterians, but Presbyterianism—that is I am opposed to their doctrine. I do not hate a man that has the rheumatism—I hate the rheumatism when it has a man. So I attack certain principles because I think they are wrong, but I always want

it understood that I have nothing against persons—nothing against victims.

There was a time when the Catholic church was in power in the Old World. All at once there arose a man called Martin Luther, and what did the dear old Catholics think? "Oh," they said, "that man and all his followers are going to Hell." But they did not go. They were very good people. They may have been mistaken—I do not know. I think they were right in their opposition to Catholicism—but I have just as much objection to the religion they founded as I have to the Church they left. But they thought they were right, and they made very good citizens, and it turned out that their differing from the Mother Church did not hurt them. And then after awhile they began to divide, and there arose Baptists, and the other gentlemen, who believed in this law that is now in New Jersey, began cutting off their ears so that they could hear better; they began putting them in prison so that they would have a chance to think. But the Baptists turned out to be good folks—first rate—good husbands, good fathers, good citizens. And in a little while, in England, the people turned to be Episcopalians, on account of a little war that Henry the Eighth had with the Pope,—and I always sided with the Pope in that war—but it made no difference; and in a little while the Episcopalians turned out to be just about like other folks—no worse—not as I know of, any better.

After awhile arose the Puritan, and the Episcopalian said, "We don't want anything of him—he is a bad man;" and they finally drove some of them away and they settled in New England, and there were among them Quakers, than whom there never were better people on the earth—industrious, frugal, gentle, kind and loving—and yet these Puritans began hanging them. They said: "They are corrupting our children; if this thing goes on, everybody will believe in being kind and gentle and good, and what will become of us?" They were honest about it. So they went

to cutting off ears. But the Quakers were good people and none of the prophecies were fulfilled.

In a little while there came some Unitarians and they said, "The world is going to ruin, sure;"—but the world went on as usual, and the Unitarians produced men like Channing—one of the tenderest spirits that ever lived—they produced men like Theodore Parker—one of the greatest brained and greatest hearted men produced upon this continent—a good man—and yet they thought he was a blasphemer—they even prayed for his death—on their bended knees they ask their God to take time to kill him. Well, they were mistaken. Honest, probably.

After awhile came the Universalists, who said: "God is good. He will not damn anybody always, just for a little mistake he made here. This is a very short life; the path we travel is very dim, and a great many shadows fall in the way, and if a man happens to stub his toe, God will not burn him forever." And then all the rest of the sects cried out, "Why, if you do away with hell, everybody will murder just for pastime—everybody will go to stealing just to enjoy themselves." But they did not. The Universalists were good people—just as good as any others. Most of them much better. None of the prophecies were fulfilled, and yet the differences existed.

And so we go on until we find people who do not believe the Bible at all, and when they say they do not, they come within this statute.

Now gentlemen, I am going to try to show you, first, that this statute under which Mr. Reynolds is being tried is unconstitutional—that it is not in harmony with the Constitution of New Jersey; and I am going to try to show you in addition to that, that it was passed hundreds of years ago, by men who believed it was right to burn heretics and tie Quakers at the end of a cart, men and even modest women—stripped naked—and lash them from town to town. They were the men who originally passed that statute, and I want to show you that it has slept all this

time, and I am informed—I do not know how it is—that there never has been a prosecution in this state for blasphemy.

Now gentlemen, what is blasphemy? Of course nobody knows what it is, unless he takes into consideration where he is. What is blasphemy in one country would be a religious exhortation in another. It is owing to where you are and who is in authority. And let me call your attention to the impudence and bigotry of the American Christians. We send missionaries to other countries. What for? To tell them that their religion is false, that their Gods are myths and monsters, that their Saviours and apostles were imposters, and that our religion is true. You send a man from Morristown—a Presbyterian, over to Turkey. He goes there and he tells the Mohammedans—and he has it in a pamphlet and he distributes it—that the Koran is a lie, that Mohammed was not a prophet of God, that the angel Gabriel is not so large that it is four hundred leagues between his eyes—that it is all a mistake—that there never was an angel as large as that. Then what would the Turks do? Suppose the Turks had a law like this statute in New Jersey. They would put the Morristown missionary in jail, and he would send home word, and then what would the people of Morristown say? Honestly—what do you think they would say? They would say, “Why, look at those poor, heathen wretches. We sent a man over there armed with the truth, and yet they were so blinded by their idolatrous religion, so steeped in superstition, that they actually put that man in prison.” Gentlemen, does not that show the need of more missionaries? I would say, yes.

Now let us turn the tables. A gentleman comes from Turkey to Morristown. He has got a pamphlet. He says, “The Koran is the inspired book, Mohammed is the real prophet, your Bible is false and your Saviour simply a myth.” Thereupon the Morristown people put him in jail. Then what would the Turks say? They would say, “Mor-

ristown needs more missionaries," and I would agree with them.

In other words, what we want is intellectual hospitality. Let the world talk. And see how foolish this trial is: I have no doubt but the prosecuting attorney agrees with me to-day, that whether this law is good or bad, this trial should not have taken place. And let me tell you why. Here comes a man into your town and circulates a pamphlet. Now if they had just kept still, very few would ever have heard of it. That would have been the end. The diameter of the echo would have been a few thousand feet. But in order to stop the discussion of that question, they indicted this man, and that question has been more discussed in this country since this indictment than all the discussions put together since New Jersey was first granted to Charles the Second's dearest brother James, the Duke of York. And what else? A trial here that is to be reported and published all over the United States, a trial that will give Mr. Reynolds a congregation of fifty millions of people. And yet this was done for the purpose of stopping a discussion of this subject. I want to show you that the thing is in itself almost idiotic—that it defeats itself, and that you cannot crush out these things by force. Not only so, but Mr. Reynolds has the right to be defended, and his counsel has the right to give his opinions on this subject.

Suppose that we put Mr. Reynolds in jail. The argument has not been sent to jail. That is still going the rounds, free as the winds. Suppose you keep him at hard labor a year—all the time he is there hundreds and thousands of people will be reading some account, or some fragment, of this trial. There is the trouble. If you could only imprison a thought, then intellectual tyranny might succeed. If you could only take an argument and put a striped suit of clothes on it—if you could only take a good, splendid, shining fact and lock it up in some dungeon of ignorance, so that its light would never again enter the mind of man,

then you might succeed in stopping human progress. Otherwise, no.

Let us see about this particular statute. In the first place, the State has a Constitution. That Constitution is a rule, a limitation to the power of the legislature, and a certain breast-work for the protection of private rights, and the Constitution says to this sea of passions and prejudices: "Thus far and no farther." The Constitution says to each individual: "This shall panoply you; this is your complete coat of mail; this shall defend your rights." And it is usual in this country to make as a part of each Constitution several general declarations—called the Bill of Rights. So I find that in the old Constitution of New Jersey, which was adopted in the year of grace 1776, although the people at that time were not educated as they are now—the spirit of the Revolution at that time not having permeated all classes of society—a declaration in favor of religious freedom. The people were on the eve of a Revolution. This Constitution was adopted on the third day of July, 1776, one day before the immortal Declaration of Independence. Now what do we find in this—and we have got to go by this light, by this torch, when we examine the statute.

I find in that Constitution, in its Eighteenth Section, this:

"No person shall ever in this State be deprived of the inestimable privilege of worshipping God in a manner agreeable to the dictates of his own conscience; nor under any pretence whatever be compelled to attend any place of worship contrary to his own faith and judgment; nor shall he be obliged to pay tithes, taxes, or any other rates for the purpose of building or repairing any church or churches, contrary to what he believes to be true."

That was a very great and splendid step. It was the divorce of Church and State. It no longer allowed the State to levy taxes for the support of a particular religion, and it said to every citizen of New Jersey: All that you give for that purpose must be voluntarily given, and the State will not compel you to pay for the maintenance of a Church in which you do not believe. So far so good.

The next paragraph was not so good.

"There shall be no establishment of any one religious sect in this State in preference to another, and no Protestant inhabitants of this State shall be denied the enjoyment of any civil right merely on account of his religious principles; but all persons professing a belief in the faith of any Protestant sect, who shall demean themselves peaceably, shall be capable of being elected to any office of profit or trust, and shall fully and freely enjoy every privilege and immunity enjoyed by other citizens."

What became of the Catholics under that clause, I do not know—whether they had any right to be elected to office or not under this Act. But in 1844, the State having grown civilized in the meantime, another Constitution was adopted. The word Protestant was then left out. There was to be no establishment of one religion over another. But Protestantism did not render a man capable of being elected to office any more than Catholicism, and nothing is said about any religious belief whatever. So far, so good.

"No religious test shall be required as a qualification for any office of public trust. No person shall be denied the enjoyment of any civil right on account of his religious principles."

That is a very broad and splendid provision. "No person shall be denied any civil right on account of his religious principles." That was copied from the Virginia Constitution, and that clause in the Virginia Constitution was written by Thomas Jefferson, and under that clause men were entitled to give their testimony in the courts of Virginia whether they believed in any religion or not, in any Bible or not, or in any God or not.

That same clause was afterwards adopted by the State of Illinois, also by many other states, and wherever that clause is, no citizen can be denied any civil right on account of his religious principles. It is a broad and generous clause. This statute under which this indictment is drawn, is not in accordance with the spirit of that splendid sentiment. Under that clause, no man can be deprived of any civil right on account of his religious principles, or on account of his belief. And yet, on account of this miserable, this antiquated, this barbarous and savage statute, the same man who cannot be denied any political or civil right, can be sent to

the penitentiary as a common felon for simply expressing his honest thought. And before I get through I hope to convince you that this statute is unconstitutional.

But we will go another step: "Every person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right."

That is in the Constitution of nearly every state in the Union, and the intention of that is to cover slanderous words—to cover a case where a man under pretence of enjoying the freedom of speech falsely assails or accuses his neighbor. Of course he should be held responsible for that abuse.

Then follows the great clause in the Constitution of 1844—more important than any other clause in that instrument—a clause that shines in that Constitution like a star at night.—

"No law shall be passed to restrain or abridge the liberty of speech or of the press."

Can anything be plainer—anything more forcibly stated? Now while you are considering this statute, I want you to keep in mind this statement. And right here there is another thing I want to call your attention to. There is a Constitution higher than any statute. There is a law higher than any Constitution. It is the law of the human conscience, and no man who is a man will defile and pollute his conscience at the bidding of any legislature. Above all things one should maintain his self-respect, and there is but one way to do that, and that is to live in accordance with your highest ideal.

There is a law higher than men can make. The facts as they exist in this poor world—the absolute consequences of certain acts—they are above all. And this higher law is the breath of progress, the very outstretched wings of civilization, under which we enjoy the freedom we have. Keep that in your minds. There never was a legislature great enough—there never was a Constitution sacred enough, to compel a civilized man to stand between a black man and his liberty. There never was a Constitution great enough

to make me stand between any human being and his right to express his honest thoughts. Such a Constitution is an insult to the human soul, and I would care no more for it than I would for the growl of a wild beast. But we are not driven to that necessity here. This Constitution is in accord with the highest and noblest aspirations of the heart—"No law shall be passed to restrain or abridge the liberty of speech."

Now let us come to this old law—this law that was asleep for a hundred years before this Constitution was adopted—this law coiled like a snake beneath the foundations of the government—this law, cowardly, dastardly—this law passed by wretches who were afraid to discuss—this law passed by men who could not, and who knew they could not, defend their creed—and so they said: "Give us the sword of the State and we will cleave the heretic down." And this law was made to control the minority. When the Catholics were in power they visited that law upon their opponents. When the Episcopalians were in power, they tortured and burned the poor Catholic who had scoffed and who had denied the truth of their religion. Whoever was in power used that, and whoever was out of power cursed that—and yet, the moment he got in power he used it. The people became civilized—but that law was on the statute book. It simply remained. There it was, sound asleep—its lips drawn over its long and cruel teeth. Nobody savage enough to waken it. And it slept on, and New Jersey has flourished. Men have done well. You have had average health in this country. Nobody roused the statute until the defendant in this case went to Boonton, and there made a speech in which he gave his honest thought, and the people not having an argument handy, threw stones. Thereupon Mr. Reynolds, the defendant, published a pamphlet on Blasphemy and in it gave a photograph of the Boonton Christians. That is his offence. Now let us read this infamous statute:

"If any person shall wilfully blaspheme the holy name of God by denying, cursing, or contumeliously reproaching his being"—

I want to say right here—many a man has cursed the God of another man. The Catholics have cursed the God of the Protestant. The Presbyterians have cursed the God of the Catholics—charged them with idolatry—cursed their images, laughed at their ceremonies. And these compliments have been interchanged between all the religions of the world. But I say here to-day that no man, unless a raving maniac, ever cursed the God in whom he believed. No man, no human being, has ever lived who cursed his own idea of God. He always curses the idea that somebody else entertains. No human being ever yet cursed what he believed to be infinite wisdom and infinite goodness—and you know it. Every man on this jury knows that. He feels that that must be an absolute certainty. Then what have they cursed? Some God they did not believe in—that is all. And has a man that right? I say yes. He has a right to give his opinion of Jupiter, and there is nobody in Morristown who will deny him that right. But several thousand years ago it would have been very dangerous for him to have cursed Jupiter, and yet Jupiter is just as powerful now as he was then, but the Roman people are not powerful, and that is all there was to Jupiter—the Roman people.

So there was a time when you could have cursed Zeus, the god of the Greeks, and like Socrates, they would have compelled you to drink hemlock. Yet now everybody can curse this god. Why? Is the god dead? No. He is just as alive as he ever was. Then what has happened? The Greeks have passed away. That is all. So in all of our Churches here. Whenever a Church is in the minority it clamors for free speech. When it gets in the majority, no. I do not believe the history of the world will show that any orthodox Church when in the majority ever had the courage to face the free lips of the world. It sends for a constable. And is it not wonderful that they should do this when they preach the gospel of universal forgiveness—when they say, “if a man strike you on one cheek turn to him the other

also"—but if he laughs at your religion, put him in the penitentiary? Is that the doctrine? Is that the law?

Now read this law. Do you know as I read this law I can almost hear John Calvin laugh in his grave. That would have been a delight to him. It is written exactly as he would have written it. There never was an inquisitor who would not have read that law with a malicious smile. The Christians who brought the fagots and ran with all their might to be at the burning, would have enjoyed that law. You know that when they used to burn people for having said something against religion, they used to cut their tongues out before they burned them. Why? For fear that if they did not, the poor burning victims might say something that would scandalize the Christian gentlemen who were building the fire. All these persons would have been delighted with this law

Let us read a little further:

"—Or by cursing or contumeliously reproaching Jesus Christ."

Why, whoever did, since the poor man, or the poor God, was crucified? How did they come to crucify him? Because they did not believe in free speech in Jerusalem. How else? Because there was a law against blasphemy in Jerusalem—a law exactly like this. Just think of it. O, I tell you we have passed too many milestones on the shining road of human progress to turn back and wallow in that blood, in that mire.

No. Some men have said that he was simply a man. Some believed that he was actually a God. Others believed that he was not only a man, but that he stood as the representative of infinite love and wisdom. No man ever said one word against that being for saying "Do unto others as ye would that others should do unto you." No man ever raised his voice against him because he said "Blessed are the merciful, for they shall obtain mercy." And are they the "merciful" who when some man endeavors to answer their argument, put him in the penitentiary? No.

The trouble is, the priests—the trouble is, the ministers—the trouble is, the people whose business it was to tell the meaning of these things, quarreled with each other and they put meanings upon human expressions by malice, meanings that the words will not bear. And let me be just to them. I believe that nearly all that has been done in this world has been honestly done. I believe that the poor savage who kneels down and prays to a stuffed snake—prays that his little children may recover from the fever—is honest, and it seems to me that a good God would answer his prayer if he could, if it was in accordance with wisdom, because the poor savage was doing the best he could, and no one can do any better than that.

So I believe that the Presbyterians who used to think that nearly everybody was going to hell, said exactly what they believed. They were honest about it, and I would not send one of them to jail—would never think of such a thing—even if he called the unbelievers of the world “wretches,” “dogs,” and “devils.” What would I do? I would simply answer him—that is all; answer him kindly. I might laugh at him a little, but I would answer him in kindness.

So these divisions of the human mind are natural. They are a necessity. Do you know that all the mechanics that ever lived—take the best ones—cannot make two clocks that will run exactly alike one hour, one minute? They cannot make two pendulums that will beat in exactly the same time, one beat. If you cannot do that, how are you going to make hundreds, thousands, billions of people, each with a different quality and quantity of brain, each clad in a robe of living, quivering flesh, and each driven by passion's storm over the wild sea of life—how are you going to make them all think alike? This is the impossible thing that Christian ignorance and bigotry and malice have been trying to do. This was the object of the Inquisition and of the foolish legislature that passed this statute.

Let me read you another line from this ignorant statute:—

“Or the Christian religion.”

Well, what is the Christian religion? "If you scoff at the Christian religion—if you curse the Christian religion." Well what is it? Gentlemen, you hear Presbyterians every day attack the Catholic Church. Is that the Christian religion? The Catholic believes it is the Christian religion, and you have to admit that it is the oldest one, and then the Catholics turn round and scoff at the Protestants. Is that the Christian religion? If so, every Christian religion has been cursed by every other Christian religion. Is not that an absurd and foolish statute?

I say that the Catholic has the right to attack the Presbyterian and tell him, "Your doctrine is all wrong." I think he has the right to say to him, "You are leading thousands to hell." If he believes it, he not only has the right to say it, but it is his duty to say it; and if the Presbyterian really believes the Catholics are all going to the devil, it is his duty to say so. Why not? I will never have any religion that I cannot defend—that is, that I do not believe I can defend. I may be mistaken, because no man is absolutely certain that he knows. We all understand that. Every one is liable to be mistaken. The horizon of each individual is very narrow, and in his poor sky the stars are few and very small.

"Or the word of God,"—

What is that?

"The canonical Scriptures contained in the books of the Old and New Testaments."

Now what has a man the right to say about that? Has he the right to show that the book of Revelation got into the canon by one vote, and one only? Has he the right to show that they passed in convention upon what books they would put in and what they would not? Has he the right to show that there were twenty-eight books called "The Books of the Hebrews?" Has he the right to show that? Has he the right to show that Martin Luther said he did not believe there was one solitary word of gospel in the Epistle to the Romans? Has he the right to show that some of

these books were not written till nearly two hundred years afterwards? Has he the right to say it, if he believes it? I do not say whether this is true or not, but has a man the right to say it if he believes it?

Now suppose I should read the Bible all through right here in Morristown, and after I got through I should make up my mind that it is not a true book—what ought I to say? Ought I to clap my hand over my mouth and start for another state, and the minute I got over the line say, "It is not true, It is not true?" Or, ought I to have the right and privilege of saying right here in New Jersey, "My fellow citizens, I have read the book—I do not believe that it is the word of God?" Suppose I read it and think it is true, then I am bound to say so. If I should go to Turkey and read the Koran and make up my mind that it is false, you would all say that I was a miserable poltroon if I did not say so.

By force you can make hypocrites—men who will agree with you from the teeth out, and in their hearts hate you. We want no more hypocrites. We have enough in every community. And how are you going to keep from having more? By having the air free,—by wiping from your statute books such miserable and infamous laws as this.

"The Holy Scriptures."

Are they holy? Must a man be honest? Has he the right to be sincere? There are thousands of things in the Scriptures that everybody believes. Everybody believes the Scriptures are right when they say, "Thou shalt not steal"—everybody. And when they say "Give good measure, heaped up and running over," everybody says, "Good!" So when they say "Love your neighbor," everybody applauds that. Suppose a man believes that, and practices it, does it make any difference whether he believes in the flood or not? Is that of any importance? Whether a man built an ark or not—does that make the slightest difference? A man might deny it and yet be a very good man. Another

might believe it and be a very mean man. Could it now, by any possibility, make a man a good father, a good husband, a good citizen? Does it make any difference whether you believe it or not? Does it make any difference whether or not you believe that a man was going through town and his hair was a little short, like mine, and some little children laughed at him, and thereupon two bears from the woods came down and tore to pieces about forty of these children? Is it necessary to believe that? Suppose a man should say, "I guess that is a mistake. They did not copy that right. I guess the man that reported that was a little dull of hearing and did not get the story exactly right." Any harm in saying that? Is a man to be sent to the penitentiary for that? Can you imagine an infinitely good God sending a man to hell because he did not believe the bear story?

So I say if you believe the Bible, say so; if you do not believe it, say so. And here is the vital mistake, I might almost say, in Protestantism itself. The Protestants when they fought the Catholics said: "Read the Bible for yourselves—stop taking it from your priests—read the sacred volume with your own eyes. It is a revelation from God to his children, and you are the children." And then they said: "If after you read it you do not believe it, and you say anything against it, we will put you in jail, and God will put you in hell." That is a fine position to get a man in. It is like a man who invited his neighbor to come and look at his pictures, saying: "They are the finest in the place, and I want your candid opinion. A man who looked at them the other day said they were daubs, and I kicked him down stairs—now I want your candid judgment." So the Protestant Church says to a man, "This Bible is a message from your Father,—your Father in heaven. Read it. Judge for yourself. But if after you have read it you say it is not true, I will put you in the penitentiary for one year." The Catholic Church has a little more sense about that—at least more logic. It says:

"This Bible is not given to everybody. It is given to the world, to be sure, but it must be interpreted by the Church. God would not give a Bible to the world unless he also appointed some one, some organization, to tell the world what it means." They said: "We do not want the world filled with interpretations, and all the interpreters fighting each other." And the Protestant has gone to the infinite absurdity of saying: "Judge for yourself, but if you judge wrong you will go to the penitentiary here and to hell hereafter."

Now let us see further:

"Or by profane scoffing expose them to ridicule."

Think of such a law as that, passed under a Constitution that says, "No law shall abridge the liberty of speech." But you must not ridicule the Scriptures. Did anybody ever dream of passing a law to protect Shakespeare from being laughed at? Did anybody ever think of such a thing? Did anybody ever want any legislative enactment to keep people from holding Robert Burns in contempt? The songs of Burns will be sung as long as there is love in the human heart. Do we need to protect him from ridicule by a statute? Does he need assistance from New Jersey? Is any statute needed to keep Euclid from being laughed at in this neighborhood? And is it possible that a work written by an infinite being has to be protected by a legislature? Is it possible that a book cannot be written by a God so that it will not excite the laughter of the human race?

Why, gentlemen, humor is one of the most valuable things in the human brain. It is the torch of the mind—it sheds light. Humor is the readiest test of truth—of the natural, of the sensible—and when you take from a man all sense of humor, there will only be enough left to make a bigot. Teach this man who has no humor—no sense of the absurd—the Presbyterian creed, fill his darkened brain with superstition and his heart with hatred—then frighten him with the threat of hell, and he will be ready to vote for that statute. Such men made that law.

Let us read another clause:—

“And every person so offending shall, on conviction, be fined not exceeding two hundred dollars, or imprisoned at hard labor not exceeding twelve months, or both.”

I want you to remember that this statute was passed in England hundreds of years ago—just in that language. The punishment, however, has been somewhat changed. In the good old days when the king sat on the throne—in the good old days when the altar was the right-bower of the throne—then, instead of saying: “fined two hundred dollars and imprisoned one year,” it was: “All his goods shall be confiscated; his tongue shall be bored with a hot iron, and upon his forehead he shall be branded with the letter B; and for the second offence he shall suffer death by burning.” Those were the good old days when people maintained the orthodox religion in all its purity and in all its ferocity.

The first question for you, gentlemen, to decide in this case is: Is this statute constitutional? Is this statute in harmony with that part of the Constitution of 1844 which says: “The liberty of speech shall not be abridged?” That is for you to say. Is this law constitutional, or is it simply an old statute that fell asleep, that was forgotten, that people simply failed to repeal? I believe I can convince you, if you will think a moment, that our fathers never intended to establish a government like that. When they fought for what they believed to be religious liberty—when they fought for what they believed to be liberty of speech, they believed that all such statutes would be wiped from the statute books of all the States.

Let me tell you another reason why I believe this. We have in this country naturalization laws. Persons may come here irrespective of their religion. They must simply swear allegiance to this country—they must forswear allegiance to every other potentate, prince and power—but they do not have to change their religion. A Hindoo may become a citizen of the United States, and the Constitution of the United States, like the Constitution of New Jersey, guar-

antees religious liberty. That Hindoo believes in a God—in a God that no Christian does believe in. He believes in a sacred book that every Christian looks upon as a collection of falsehoods. He believes, too, in a Saviour—in Buddha. Now I ask you,—when that man comes here and becomes a citizen—when the Constitution is about him, above him—has he the right to give his ideas about his religion? Has he the right to say in New Jersey: “There is no God except the Supreme Brahm—there is no Saviour except Buddha the Illuminated, Buddha the Blest?” I say that he has that right—and you have no right, because in addition to that he says, “You are mistaken; your God is not God; your Bible is not true, and your religion is a mistake,” to abridge his liberty of speech. He has the right to say it, and if he has the right to say it, I insist before this Court and before this jury, that he has the right to give his reasons for saying it; and in giving those reasons, in maintaining his side, he has the right, not simply to appeal to history, not simply to the masonry of logic, but he has the right to shoot the arrows of wit, and to use the smile of ridicule. Anything that can be laughed out of this world ought not to stay in it.

So the Persian—the believer in Zoroaster, in the spirits of Good and Evil, and that the spirit of Evil will finally triumph forever—if that is his religion—has the right to state it, and the right to give his reasons for his belief. How infinitely preposterous for you, one of the states of this Union, to invite a Persian or a Hindoo to come to your shores. You do not ask him to renounce his God. You ask him to renounce the Shah. Then when he becomes a citizen, having the rights of every other citizen, he has the right to defend his religion and to denounce yours.

There is another thing. What was the spirit of our government at that time? You must look at the leading men. Who were they? What were their opinions? Were most of them as guilty of blasphemy as is the defendant in this case? Thomas Jefferson—and there is in my judgment

only one name on the page of American history greater than his—only one name for which I have a greater and a tenderer reverence—and that is Abraham Lincoln, because of all men who ever lived and had power, he was the most merciful. And that is the way to test a man. How does he use power? Does he want to crush his fellow citizens? Does he like to lock somebody up in the penitentiary because he has the power of the moment? Does he wish to use it as a despot, or as a philanthropist—like a devil, or like a man?

Thomas Jefferson entertained about the same views entertained by the defendant in this case, and he was made President of the United States. He was the author of the Declaration of Independence, founder of the University of Virginia, writer of that clause in the Constitution of that state that made all the citizens equal before the law. And when I come to the very sentences here charged as blasphemy, I will show you that these were the common sentiments of thousands of very great, of very intellectual and admirable men.

I have no time, and it may be this is not the place and the occasion, to call your attention to the infinite harm that has been done in almost every religious nation by statutes such as this. Where that statute is, liberty cannot be; and if this statute is enforced by this jury and by this Court, and if it is afterwards carried out, and if it could be carried out in the states of this Union, there would be an end of all intellectual progress. We would go back to the dark ages. Every man's mind, upon these subjects at least, would become a stagnant pool, covered with the scum of prejudice and meanness.

And wherever such laws have been enforced, have the people been friends? Here we are to-day in this blessed air—here amid these happy fields. Can we imagine, with these surroundings, that a man for having been found with a crucifix in his poor little home had been taken from his wife and children and burned—burned by Protestants? You cannot conceive of such a thing now. Neither can

you conceive that there was a time when Catholics found some poor Protestant contradicting one of the dogmas of the Church, and took that poor honest wretch—while his wife wept—while his children clung to his hands—to the public square, drove a stake in the ground, put a chain or two about him, lighted the fagots, and let the wife whom he loved and his little children see the flames climb around his limbs—you cannot imagine that any such infamy was ever practiced. And yet I tell you that the same spirit made this detestable, infamous, devilish statute.

You can hardly imagine that there was a time when the same kind of men that made this law said to another man: "You say this world is round?" "Yes, sir; I think it is, because I have seen its shadow on the moon." "You have?"—Now can you imagine a society outside of hyenas and boa-constrictors that would take that man, put him in the penitentiary, in a dungeon, turn the key upon him, and let his name be blotted from the book of human life? Years afterward some explorer amid ruins finds a few bones. The same spirit that did that made this statute—the same spirit that did that went before the grand jury in this case—exactly. Give the men that had this man indicted the power, and I would not want to live in that particular part of the country. I would not willingly live with such men. I would go somewhere else, where the air is free, where I could speak my sentiments to my wife, to my children, and to my neighbors.

Now this persecution differs only in degree from the infamies of the olden time. What does it mean? It means that the state of New Jersey has all the light it wants. And what does that mean? It means that the state of New Jersey is absolutely infallible—that it has got its growth, and does not propose to grow any more. New Jersey knows enough, and it will send teachers to the penitentiary.

It is hardly possible that this state has accomplished all that it is ever going to accomplish. Religions are for a day. They are the clouds. Humanity is the eternal blue.

Religions are the waves of the sea. These waves depend upon the force and direction of the wind—that is to say, of passion; but Humanity is the great sea. And so our religions change from day to day, and it is a blessed thing that they do. Why? Because we grow, and we are getting a little more civilized every day,—and any man that is not willing to let another man express his opinion, is not a civilized man, and you know it. Any man that does not give to everybody else the rights he claims for himself, is not an honest man.

Here is a man who says, “I am going to join the Methodist Church.” What right has he? Just the same right to join it that I have not to join it—no more, no less. But if you are a Methodist and I am not, it simply proves that you do not agree with me, and that I do not agree with you—that is all. Another man is a Catholic. He was born a Catholic, or is convinced that Catholicism is right. That is his business, and any man that would persecute him on that account, is a poor barbarian—a savage; any man that would abuse him on that account, is a barbarian—a savage.

Then I take the next step. A man does not wish to belong to any church. How are you going to judge him? Judge him by the way he treats his wife, his children, his neighbors. Does he pay his debts? Does he tell the truth? Does he help the poor? Has he got a heart that melts when he hears grief’s story? That is the way to judge him. I do not care what he thinks about the bears, or the flood, about bibles or gods. When some poor mother is found wandering in the street with a babe at her breast, does he quote Scripture, or hunt for his pocket-book? That is the way to judge. And suppose he does not believe in any bible whatever? If Christianity is true, that is his misfortune, and everybody should pity the poor wretch that is going down the hill. Why kick him? You will get your revenge on him through all eternity—is not that enough?

So I say, let us judge each other by our actions, not by

theories, not by what we happen to believe—because that depends very much on where we were born.

If you had been born in Turkey, you probably would have been a Mohammedan. If I had been born among the Hindoos, I might have been a Buddhist—I can't tell. If I had been raised in Scotland, on oat meal, I might have been a Covenanter—nobody knows. If I had lived in Ireland and seen my poor wife and children driven into the street, I think I might have been a Home Ruler—no doubt of it. You see it depends on where you were born—much depends on our surroundings.

Of course, there are men born in Turkey who are not Mohammedans, and there are men born in this country who are not Christians—Methodists, Unitarians, or Catholics, plenty of them, who are unbelievers—plenty of them who deny the truth of the Scriptures—plenty of them who say: "I know not whether there be a God or not." Well, it is a thousand times better to say that honestly than to say dishonestly that you believe in God.

If you want to know the opinion of your neighbor, you want his honest opinion. You do not want to be deceived. You do not want to talk with a hypocrite. You want to get straight at his honest mind—and then you are going to judge him, not by what he says but by what he does. It is very easy to sail along with the majority—easy to sail the way the boats are going—easy to float with the stream; but when you come to swim against the tide, with the men on the shore throwing rocks at you, you will get a good deal of exercise in this world.

And do you know that we ought to feel under the greatest obligation to men who have fought the prevailing notions of their day! There is not a Presbyterian in Morristown that does not hold up for admiration the man that carried the flag of the Presbyterians when they were in the minority—not one. There is not a Methodist in this state who does not admire John and Charles Wesley and Whitefield, who carried the banner of that new and despised sect when it

was in the minority. They glory in them because they braved public opinion, because they dared to oppose idiotic, barbarous and savage statutes like this: And there is not a Universalist that does not worship dear old Hosea Ballou—I love him myself—because he said to the Presbyterian minister: “You are going around trying to keep people out of hell, and I am going around trying to keep hell out of the people.” Every Universalist admires him and loves him because when despised and railed at and spit upon, he stood firm, a patient witness for the eternal mercy of God. And there is not a solitary Protestant who does not honor Martin Luther—who does not honor the Covenanters in poor Scotland, and that poor girl who was tied out on the sand of the sea by Episcopalians, and kept there till the rising tide drowned her, and all she had to do to save her life was to say, “God save the king;” but she would not say it without the addition of the words, “If it be God’s will.” No one, who is not a miserable, contemptible wretch, can fail to stand in admiration before such courage, such self-denial—such heroism. No matter what the attitude of your body may be, your soul falls on its knees before such men and such women.

Let us take another step. Where would we have been if authority had always triumphed? Where would we have been if such statutes had always been carried out? We have now a science called Astronomy. That science has done more to enlarge the horizon of human thought than all things else. We now live in an infinite universe. We know that the sun is a million times larger than our earth, and we know that there are other great luminaries millions of times larger than our sun. We know that there are planets so far away that light, traveling at the rate of one hundred and eighty-five thousand miles a second, requires fifteen thousand years to reach this grain of sand, this tear, we call the earth—and we now know that all the fields of space are sown thick with constellations. If that statute had been enforced, that science would not now be the property of

the human mind. That science is contrary to the Bible, and for asserting the truth you become a criminal. For what sum of money, for what amount of wealth, would the world have the science of Astronomy expunged from the brain of man? We learned the story of the stars in spite of that statute.

The first men who said the world was round were scourged for scoffing at the Scriptures. And even Martin Luther, speaking of one of the greatest men that ever lived, said: "Does he think with his little lever to overturn the Universe of God?" Martin Luther insisted that such men ought to be trampled under foot. If that statute had been carried into effect, Galileo would have been impossible. Kepler, the discoverer of the three laws, would have died with the great secret locked in his brain, and mankind would have been left ignorant, superstitious, and besotted. And what else? If that statute had been carried out, the world would have been deprived of the philosophy of Spinoza; of the philosophy, of the literature, of the wit and wisdom, the justice and mercy of Voltaire, the greatest Frenchman that ever drew the breath of life—the man who by his mighty pen abolished torture in a nation, and helped to civilize a world.

If that statute had been enforced, nearly all the books that enrich the libraries of the world could not have been written. If that statute had been enforced, Humboldt could not have delivered the lectures now known as "The Cosmos." If that statute had been enforced, Charles Darwin would not have been allowed to give to the world his discoveries that have been of more benefit to mankind than all the sermons ever uttered. In England they have placed his sacred dust in the great Abbey. If he had lived in New Jersey, and this statute could have been enforced, he would have lived one year at least in your penitentiary. Why? That man went so far as not simply to deny the truth of your Bible, but absolutely to deny the existence of your God. Was he a good man? Yes, one of the noblest and greatest

of men. Humboldt, the greatest German who ever lived, was of the same opinion.

And so I might go on with the great men of to-day. Who are the men who are leading the race upward and shedding light in the intellectual world? They are the men declared by that statute to be criminals. Mr. Spencer could not publish his books in the State of New Jersey. He would be arrested, tried, and imprisoned; and yet that man has added to the intellectual wealth of the world.

So with Huxley, so with Tyndal, so with Helmholtz—so with the greatest thinkers and greatest writers of modern times.

You may not agree with these men—and what does that prove? It simply proves that they do not agree with you—that is all. Who is to blame? I do not know. They may be wrong, and you may be right; but if they had the power, and put you in the penitentiary simply because you differed with them, they would be savages; and if you have the power and imprison men because they differ from you, why then, of course, you are savages.

No; I believe in intellectual hospitality. I love men that have a little horizon to their minds—a little sky, a little scope. I hate anything that is narrow and pinched and withered and mean and crawling, and that is willing to live on dust. I believe in creating such an atmosphere that things will burst into blossom. I believe in good will, good health, good fellowship, good feeling—and if there is any God on the earth, or in heaven, let us hope that He will be generous and grand. Do you not see what the effect will be? I am not cursing you because you are a Methodist, and not damning you because you are a Catholic, or because you are an Infidel—a good man is more than all of these. The grandest of all things is to be in the highest and noblest sense a man.

Now let us see the frightful things that this man, the defendant in this case, has done. Let me read the charges against him as set out in this indictment.

I shall insist that this statute does not cover any publication—that it covers simply speech—not in writing, not in book or pamphlet. Let us see:

“This Bible describes God as so loving that he drowned the whole world in his mad fury.”

Well, the great question about that is, is it true? Does the Bible describe God as having drowned the whole world with the exception of eight people? Does it, or does it not? I do not know whether there is anybody in this county who has really read the Bible, but I believe the story of the flood is there. It does say that God destroyed all flesh, and that he did so because he was angry. He says so himself, if the Bible be true.

The defendant has simply repeated what is in the Bible. The Bible says that God is loving, and says that he drowned the world, and that he was angry. Is it blasphemy to quote from the “Sacred Scriptures?”

“Because it was so much worse than he, knowing all things, ever supposed it could be.”—

Well, the Bible does say that he repented having made man. Now is there any blasphemy in saying that the Bible is true? That is the only question. It is a fact that God, according to the Bible, did drown nearly everybody. If God knows all things, he must have known at the time he made them that he was going to drown them. Is it likely that a being of infinite wisdom would deliberately do what he knew he must undo? Is it blasphemy to ask that question? Have you a right to think about it at all? If you have, you have the right to tell somebody what you think—if not, you have no right to discuss it, no right to think about it. All you have to do is to read it and believe it—to open your mouth like a young robin, and swallow—worms or shingle nails—no matter which.

The defendant further blasphemed and said that:—

“An all-wise, unchangeable God, who got out of patience with a world which was just what his own stupid blunder-

ing had made it, knew no better way out of the muddle than to destroy it by drowning!"

Is that true? Was not the world exactly as God made it? Certainly. Did he not, if the Bible is true, drown the people? He did. Did he know he would drown them when he made them? He did. Did he know they ought to be drowned when they were made? He did. Where, then, is the blasphemy in saying so? There is not a minister in this world who could explain it—who would be permitted to explain it—under this statute. And yet you would arrest this man and put him in the penitentiary. But after you lock him in the cell, there remains the question still. Is it possible that a good and wise God, knowing that he was going to drown them, made millions of people? What did he make them for? I do not know. I do not pretend to be wise enough to answer that question. Of course, you cannot answer the question. Is there anything blasphemous in that? Would it be blasphemy in me to say I do not believe that any God ever made men, women and children—mothers, with babes clasped to their breasts, and then sent a flood to fill the world with death?

A rain lasting for forty days—the water rising hour by hour, and the poor wretched children of God climbing to the tops of their houses—then to the tops of the hills. The water still rising—no mercy. The people climbing higher and higher, looking to the mountain for salvation—the merciless rain still falling, the inexorable flood still rising. Children falling from the arms of mothers—no pity. The highest hills covered—infancy and old age mingling in death—the cries of women, the sobs and sighs lost in the roar of waves—the heavens still relentless. The mountains are covered—a shoreless sea rolls round the world, and on its billows are billions of corpses.

This is the greatest crime that man has imagined, and this crime is called a deed of infinite mercy.

Do you believe that? I do not believe one word of it,

and I have the right to say to all the world that this is false.

If there be a good God, the story is not true. If there be a wise God, the story is not true. Ought an honest man to be sent to the penitentiary for simply telling the truth?

Suppose we had a statute that whoever scoffed at Science—whoever by profane language should bring the Rule of Three into contempt, or whoever should attack the proposition that two parallel lines will never include a space, should be sent to the penitentiary—what would you think of it? It would be just as wise and just as idiotic as this.

And what else says the defendant?

"The Bible-God says that his people made him jealous."
"Provoked him to anger."

Is that true? It is. If it is true, is it blasphemous?

Let us read another line—

"And now he will raise the mischief with them; that his anger burns like hell."

That is true. The Bible says of God—"My anger burns to the lowest hell." And that is all that the defendant says. Every word of it is in the Bible. He simply does not believe it—and for that reason is a "blasphemer."

I say to you now, gentlemen,—and I shall argue to the Court,—that there is not in what I have read a solitary blasphemous word—not a word that has not been said in hundreds of pulpits in the Christian world. Theodore Parker, a Unitarian, speaking of this Bible-God, said: "Vishnu with a necklace of skulls, Vishnu with bracelets of living, hissing serpents, is a figure of Love and Mercy compared to the God of the Old Testament." That, we might call "blasphemy," but not what I have read.

Let us read on:—

"He would destroy them all were it not that he feared the wrath of the enemy."

That is in the Bible—word for word. Then the defendant in astonishment says:

"The Almighty God afraid of his enemies!"

That is what the Bible says. What does it mean? If the Bible is true, God was afraid.

"Can the mind conceive of more horrid blasphemy?"

Is not that true? If God be infinitely good and wise and powerful, is it possible he is afraid of anything? If the defendant had said that God was afraid of his enemies, that might have been blasphemy—but this man says the Bible says that, and you are asked to say that it is blasphemy. Now, up to this point there is no blasphemy, even if you were to enforce this infamous statute—this savage law.

"The Old Testament records for our instruction in morals the most foul and bestial instances of fornication, incest, and polygamy, perpetrated by God's own saints, and the New Testament indorses these lecherous wretches as examples for all good Christians to follow."

Now is it not a fact that the Old Testament does uphold polygamy? Abraham would have gotten into trouble in New Jersey—no doubt of that. Sarah could have obtained a divorce in this state,—no doubt of that. What is the use of telling a falsehood about it? Let us tell the truth about the patriarchs.

Everybody knows that the same is true of Moses. We have all heard of Solomon—a gentleman with five or six hundred wives, and three or four hundred other ladies with whom he was acquainted. This is simply what the defendant says. Is there any blasphemy about that? It is only the truth. If Solomon were living in the United States to-day, we would put him in the penitentiary. You know that under the Edmunds' Mormon law he would be locked up. If you should present a petition signed by his eleven hundred wives, you could not get him out.

So it was with David. There are some splendid things about David, of course. I admit that, and pay my tribute of respect to his courage—but he happened to have ten or twelve wives too many, so he shut them up, put them in a

kind of penitentiary and kept them there till they died. That would not be considered good conduct even in Morris-town. You know that. Is it any harm to speak of it? There are plenty of ministers here to set it right—thousands of them all over the country, every one with his chance to talk all day Sunday and nobody to say a word back. The pew cannot reply to the pulpit, you know; it has just to sit there and take it. If there is any harm in this, if it is not true, they ought to answer it. But it is here, and the only answer is an indictment.

I say that Lot was a bad man. So I say of Abraham, and of Jacob. Did you ever know of a more despicable fraud practiced by one brother on another than Jacob practiced on Esau? My sympathies have always been with Esau. He seemed to be a manly man. Is it blasphemy to say that you do not like a hypocrite, a murderer, or a thief, because his name is in the Bible? How do you know what such men are mentioned for? May be they are mentioned as examples, and you certainly ought not to be led away and induced to imagine that a man with seven hundred wives is a pattern of domestic propriety, one to be followed by yourself and your sons. I might go on and mention the names of hundreds of others who committed every conceivable crime, in the name of religion—who declared war, and on the field of battle killed men, women and babes, even children yet unborn, in the name of the most merciful God. The Bible is filled with the names and crimes of these sacred savages, these inspired beasts. Any man who says that a God of love commanded the commission of these crimes is, to say the least of it, mistaken. If there be a God, then it is blasphemous to charge him with the commission of crime.

But let us read further from this indictment:

“The aforesaid printed document contains other scandalous, infamous and blasphemous matters and things to the tenor and effect following, that is to say”—

Then comes this particularly blasphemous line:

“Now, reader, take time and calmly think it over.”

Gentlemen, there are many things I have read that I should not have expressed in exactly the same language used by the defendant, and many things that I am going to read I might not have said at all, but the defendant had the right to say every word with which he is charged in this indictment. He had the right to give his honest thought, no matter whether any human being agreed with what he said or not, and no matter whether any other man approved of the manner in which he said these things. I defend his right to speak, whether I believe in what he spoke or not, or in the propriety of saying what he did. I should defend a man just as cheerfully who had spoken against my doctrine, as one who had spoken against the popular superstitions of my time. It would make no difference to me how unjust the attack was upon my belief—how maliciously ingenious; and no matter how sacred the conviction that was attacked, I would defend the freedom of speech. And why? Because no attack can be answered by force, no argument can be refuted by a blow, or by imprisonment, or by fine. You may imprison the man, but the argument is free; you may fell the man to the earth, but the statement stands.

The defendant in this case has attacked certain beliefs, thought by the Christian world to be sacred. Yet, after all, nothing is sacred but the truth, and by truth I mean what a man sincerely and honestly believes. The defendant says:

“Take time to calmly think it over: Was a Jewish girl the mother of God, the mother of your God?”

The defendant probably asked this question supposing that it must be answered by all sensible people in the negative. If the Christian religion is true, then a Jewish girl was the mother of Almighty God. Personally, if the doctrine is true, I have no fault to find with the statement that a Jewish maiden was the mother of God.—Millions believe that this is true—I do not believe,—but who knows? If a God came from the throne of the universe, came to this world and became the child of a pure and loving woman,

it would not lessen, in my eyes, the dignity or the greatness of that God.

There is no more perfect picture on the earth, or within the imagination of man, than a mother holding in her thrilled and happy arms a child, the fruit of love.

No matter how the statement is made, the fact remains the same. A Jewish girl became the mother of God. If the Bible is true, that is true, and to repeat it, even according to your law, is not blasphemous, and to doubt it, or to express the doubt, or to deny it, is not contrary to your Constitution.

To this defendant it seemed improbable that God was ever born of woman, was ever held in the lap of a mother; and because he cannot believe this, he is charged with blasphemy. Could you pour contempt on Shakespeare by saying that his mother was a woman,—by saying that he was once a poor crying little helpless child? Of course he was; and he afterwards became the greatest human being that ever touched the earth,—the only man whose intellectual wings have reached from sky to sky; and he was once a crying babe. What of it? Does that cast any scorn or contempt upon him? Does this take any of the music from "Midsummer Night's Dream"?—any of the passionate wealth from "Antony and Cleopatra," and philosophy from "Macbeth," any intellectual grandeur from "King Lear"? On the contrary, these great productions of the brain show the growth of the dimpled babe, give every mother a splendid dream and hope for her child, and cover every cradle with a sublime possibility.

The defendant is also charged with having said that "*God cried and screamed.*"

Why not? If he was absolutely a child, he was like other children,—like yours, like mine. I have seen the time, when absent from home, that I would have given more to have heard my children cry, than to have heard the finest orchestra that ever made the air burst into flower. What if God did cry? It simply shows that his humanity was

real and not assumed, that it was a tragedy, real, and not a poor pretense. And the defendant also says that if the orthodox religion be true, that he

“God of the Universe kicked, and flung about his little arms, and made aimless dashes into space with his little fists.”

Is there anything in this that is blasphemous? One of the best pictures I ever saw of the Virgin and Child was painted by the Spaniard, Murillo. Christ appears to be a truly natural, chubby, happy babe. Such a picture takes nothing from the majesty, the beauty, or the glory of the incarnation.

I think it is the best thing about the Catholic Church that it lifts up for adoration and admiration, a mother,—that it pays what it calls “Divine honors” to a woman. There is certainly goodness in that, and where a Church has so few practices that are good, I am willing to point this one out. It is the one redeeming feature about Catholicism that it teaches the worship of a woman.

The defendant says more about the childhood of Christ. He goes so far as to say, that

“He was found staring foolishly at his own little toes.”

And why not? The Bible says, that “he increased in wisdom and stature.” The defendant might have referred to something far more improbable. In the same verse in which St. Luke says that Jesus increased in wisdom and stature, will be found the assertion that he increased in favor with God and man. The defendant might have asked how it was that the love of God for God increased.

But the defendant has simply stated that the child Jesus grew, as other children grow; that he acted like other children, and if he did, it is more than probable that he did stare at his own toes. I have laughed many a time to see little children astonished with the sight of their feet. They seem to wonder what on earth puts the little toes in motion. Certainly there is nothing blasphemous in supposing that the feet of Christ amused him, precisely as the feet of other

children have amused them. There is nothing blasphemous about this; on the contrary, it is beautiful. If I believed in the existence of God, the creator of this world, the being who, with the hand of infinity, sowed the fields of space with stars, as a farmer sows his grain, I should like to think of Him as a little dimpled babe, overflowing with joy, sitting upon the knees of a loving mother. The ministers, themselves, might take a lesson even from the man who is charged with blasphemy, and make an effort to bring an infinite God a little nearer to the human heart.

The defendant also says, speaking of the infant Christ, "*He was nursed at Mary's breast.*"

Yes, and if the story be true, that is the tenderest fact in it. Nursed at the breast of a woman. No painting, no statute, no words can make a deeper and a tenderer impression upon the heart of man than this: The Infinite God, a babe, nursed at the holy breast of woman.

You see these things do not strike all people the same. To a man that has been raised on the Orthodox desert, these things are incomprehensible. He has been robbed of his humanity. He has no humor, nothing but the stupid and the solemn. His fancy sits with folded wings.

Imagination, like the atmosphere of Spring, wooes every seed of earth to seek the blue of heaven, and whispers of bud and flower and fruit. Imagination gathers from every field of thought and pours the wealth of many lives into the lap of one. To the contracted, to the cast-iron people who believe in heartless and inhuman creeds, the words of the defendant seem blasphemous, and to them the thought that God was a little child is monstrous.

They cannot bear to hear it said that he nursed at the breast of a maiden, that he was wrapped in swaddling clothes, that he had the joys and sorrows of other babes. I hope, gentlemen, that not only you, but the attorneys for the prosecution, have read what is known as the "Apocryphal New Testament," books that were once considered inspired, once admitted to be genuine, and that once formed

a part of our New Testament. I hope you have read the books of Joseph and Mary, of the Shepherd of Hermes, of the Infancy and of Mary, in which many of the things done by the youthful Christ are described—books that were once the delight of the Christian world; books that gave joy to children, because in them they read that Christ made little birds of clay, that would at his command stretch out their wings and fly with joy above his head. If the defendant in this case had said anything like that, here in the State of New Jersey, he would have been indicted; the Orthodox Ministers would have shouted “blasphemy,” and yet, these little stories made the name of Christ dearer to children.

The Church of to-day lacks sympathy; the theologians are without affection. After all, sympathy is genius. A man who really sympathizes with another understands him. A man who sympathizes with a religion instantly sees the good that is in it, and the man who sympathizes with the right, sees the evil that a creed contains.

But the defendant, still speaking of the infant Christ, is charged with having said,

“God smiled when he was comfortable. He lay in a cradle and was rocked to sleep.”

Yes, and there is no more beautiful picture than that. Let some great religious genius paint a picture of this kind—of a babe smiling with content, rocked in the cradle by the mother who bends tenderly and proudly above him. There could be no more beautiful, no more touching, picture than this. What would I not give for a picture of Shakespeare as a babe,—a picture that was a likeness,—rocked by his mother? I would give more for this than for any painting that now enriches the walls of the world.

The defendant also says, that

“God was sick when cutting his teeth.”

And what of that? We are told that he was tempted in all points, as we are. That is to say, he was afflicted, he was hungry, he was thirsty, he suffered the pains and miseries

common to man. Otherwise, he was not flesh, he was not human.

"He caught the measles, the mumps, the scarlet fever and the whooping cough."

Certainly he was liable to have these diseases, for he was, in fact, a child. Other children have them. Other children, loved as dearly by their mothers as Christ could have been by his, and yet they are taken from the little family by fever; taken, it may be, and buried in the snow, while the poor mother goes sadly home, wishing that she was lying by its side. All that can be said of every word in this address, about Christ and about his childhood, amounts to this; that he lived the life of a child; that he acted like other children. I have read you substantially what he has said, and this is considered blasphemous.

He has said, that—

"According to the Old Testament, the God of the Christian world commanded people to destroy each other."

If the Bible is true, then the statement of the defendant is true. Is it calculated to bring God into contempt to deny that he upheld polygamy, that he ever commanded one of his generals to rip open with the sword of war, the woman with child? Is it blasphemy to deny that a God of infinite love gave such commandments? Is such a denial calculated to pour contempt and scorn upon the God of the Orthodox? Is it blasphemous to deny that God commanded his children to murder each other? Is it blasphemous to say that he was benevolent, merciful and just?

It is impossible to say that the Bible is true and that God is good. I do not believe that a God made this world, filled it with people and then drowned them. I do not believe that infinite wisdom ever made a mistake. If there be any God he was too good to commit such an infinite crime, too wise to make such a mistake. Is this blasphemy? Is it blasphemy to say that Solomon was not a virtuous man, or that David was an adulterer?

Must we say when this ancient king had one of his best

generals placed in the front of the battle—deserted him and had him murdered for the purpose of stealing his wife, that he was “a man after God’s own heart”? Suppose the defendant in this case were guilty of something like that. Uriah was fighting for his country, fighting the battles of David, the king. David wanted to take from him his wife. He sent for Joab, his commander in chief, and said to him: “Make a feint to attack a town. Put Uriah at the front of the attacking force and when the people sally forth from the town to defend its gate, fall back so that this gallant, noble, patriotic man may be slain.” This was done and the widow was stolen by the king. Is it blasphemy to tell the truth and to say exactly what David was? Let us be honest with each other; let us be honest with this defendant.

For thousands of years men have taught that the ancient patriarchs were sacred, that they were far better than the men of modern times; that what was in them a virtue, is in us a crime. Children are taught in Sunday-schools to admire and respect these criminals of the ancient days. The time has come to tell the truth about these men, to call things by their proper names, and above all, to stand by the right, by the truth, by mercy and by justice. If what the defendant has said is blasphemy under this statute then the question arises, is the statute in accordance with the Constitution? If this statute is constitutional, why has it been allowed to sleep for all these years? I take this position: Any law made for the preservation of a human right, made to guard a human being, cannot sleep long enough to die; but any law that deprives a human being of a natural right—if that law goes to sleep, it never wakes, it sleeps the sleep of death.

I call the attention of the Court to that remarkable case in England where, only a few years ago, a man appealed to trial by battle. The law allowing trial by battle had been asleep in the statute book of England for more than two hundred years, and yet the Court held that, in spite

of the fact that the law had been asleep—it being a law in favor of a defendant—he was entitled to trial by battle. 'And why? Because it was a statute at the time made in defense of a human right, and that statute could not sleep long enough or soundly enough to die. In consequence of this decision, the Parliament of England passed a special act, doing away forever with the trial by battle.

When a statute attacks an individual right the State must never let it sleep. When it attacks the right of the public at large and is allowed to pass into a state of slumber, it cannot be raised for the purpose of punishing an individual.

Now gentlemen, a few words more. I take an almost infinite interest in this trial, and before you decide, I am exceedingly anxious that you should understand with clearness the thoughts I have expressed upon this subject. I want you to know how the civilized feel, and the position now taken by the leaders of the world.

A few years ago almost everything spoken against the grossest possible superstition was considered blasphemous. The altar hedged itself about with the sword; the Priest went in partnership with the King. In those days statutes were leveled against all human speech. Men were convicted of blasphemy because they believed in an actual personal God; because they insisted that God had body and parts. Men were convicted of blasphemy because they denied that God had form. They have been imprisoned for denying the doctrine of transubstantiation, and they have been torn in pieces for defending that doctrine. There are but few dogmas now believed by any Christian church that have not at some time been denounced as blasphemous.

When Henry VIII. put himself at the head of the Episcopal church a creed was made, and in that creed there were five dogmas that must, of necessity, be believed. Anybody who denied anyone, was to be punished—for the first offense, with fine, with imprisonment, or branding, and for

the second offense, with death. Not one of these five dogmas is now a part of the creed of the Church of England.

So I could go on for days and weeks and months, showing that hundreds and hundreds of religious dogmas, to deny which was death, have been either changed or abandoned for others nearly as absurd as the old ones were. It may be, however, sufficient to say, that wherever the Church has had power it has been a crime for any man to speak his honest thought. No Church has ever been willing that any opponent should give a transcript of his mind. Every Church in power has appealed to brute force, to the sword, for the purpose of sustaining its creed. Not one has had the courage to occupy the open field. The Church has not been satisfied with calling infidels and unbelievers blasphemers. Each Church has accused nearly every other Church of being a blasphemer. Every pioneer has been branded as a criminal. The Catholics called Martin Luther a blasphemer, and Martin Luther called Copernicus a blasphemer. Pious ignorance always regards intelligence as a kind of blasphemy. Some of the greatest men of the world, some of the best, have been put to death for the crime of blasphemy, that is to say, for the crime of endeavoring to benefit their fellow men.

As long as the Church has the power to close the lips of men, so long and no longer will superstition rule this world.

Blasphemy is the word that the majority hisses into the ear of the few. After every argument of the Church has been answered, has been refuted, then the Church cries, "blasphemy!" Blasphemy is what an old mistake says of a newly discovered truth. Blasphemy is what a withered last year's leaf says to a this year's bud. Blasphemy is the bulwark of religious prejudice. Blasphemy is the breast-plate of the heartless.

And let me say now, that the crime of blasphemy, as set out in this statute, is impossible. No man can blaspheme a book. No man can commit blasphemy by telling his honest

thought. No man can blaspheme a God, or a Holy Ghost, or a Son of God. The Infinite cannot be blasphemed.

In the olden time, in the days of savagery and superstition, when some poor man was struck by lightning, or when a blackened mark was left on the breast of a wife and mother, the poor savage supposed that some God, angered by something he had done, had taken his revenge. What else did the savage suppose? He believed that this God had the same feelings, with regard to the loyalty of his subjects, that an earthly chief had, or an earthly king with regard to the loyalty or treachery of members of his tribe, or citizens of his kingdom. So the savage said, when his country was visited by a calamity, when the flood swept the people away, or the storm scattered their poor houses in fragments: "We have allowed some freethinker to live; some one is in our town or village who has not brought his gift to the priest, his incense to the altar; some man of our tribe or of our country does not respect our God." Then, for the purpose of appeasing the supposed God, for the purpose of again winning a smile from Heaven, for the purpose of securing a little sunlight for their fields and homes, they drag the accused man from his home, from his wife and children, and with all the ceremonies of pious brutality, shed his blood. They did it in self-defense; they believed that they were saving their own lives and the lives of their children; they did it to appease their God. Most people are now beyond that point. Now, when disease visits a community, the intelligent do not say the disease came because the people were wicked; when the cholera comes, it is not because of the Methodists, of the Catholics, of the Presbyterians, or of the infidels. When the wind destroys a town in the far West, it is not because somebody there had spoken his honest thoughts. We are beginning to see that the wind blows and destroys without the slightest reference to man, without the slightest care whether it destroys the good or the bad, the irreligious or the religious. When the lightning leaps from the clouds it is just as likely to strike a

good man as a bad man, and when the great serpents of flame climb around the houses of men, they burn just as gladly and just as joyously, the home of virtue, as they do the den and lair of vice.

Then the reason for all these laws has failed. The laws were made on account of a superstition. That superstition has faded from the minds of intelligent men and, as a consequence, the laws based on the superstition ought to fail.

There is one splendid thing in nature, and that is that men and nations must reap the consequences of their acts—reap them in this world, if they live, and in another, if there be one. That man who leaves this world a bad man, a malicious man, will probably be the same man when he reaches another realm, and the man who leaves this shore good, charitable and honest, will be good, charitable and honest, no matter on what star he lives again. The world is growing sensible upon these subjects, and as we grow sensible, we grow charitable.

Another reason has been given for these laws against blasphemy, the most absurd reason that can by any possibility be given. It is this. There should be laws against blasphemy, because the man who utters blasphemy endangers the public peace.

Is it possible that Christians will break the peace? Is it possible that they will violate the law? Is it probable that Christians will congregate together and make a mob, simply because a man has given an opinion against their religion? What is their religion? They say, "If a man smites you on one cheek, turn the other also." They say, "We must love our neighbors as we love ourselves." Is it possible then, that you can make a mob out of Christians,—that these men, who love even their enemies, will attack others, and will destroy life, in the name of universal love? And yet, Christians themselves say that there ought to be laws against blasphemy, for fear that Christians, who are controlled by universal love, will become so outraged, when

they hear an honest man express an honest thought, that they will leap upon him and tear him in pieces.

What is blasphemy? I will give you a definition; I will give you my thought upon this subject. What is real blasphemy? To live on the unpaid labor of other men—that is blasphemy. To enslave your fellow-man, to put chains upon his body—that is blasphemy. To enslave the minds of men, to put manacles upon the brain, padlocks upon the lips—that is blasphemy. To deny what you believe to be true, to admit to be true what you believe to be a lie—that is blasphemy. To strike the weak and unprotected, in order that you may gain the applause of the ignorant and superstitious mob—that is blasphemy. To persecute the intelligent few, at the command of the ignorant many—that is blasphemy. To forge chains, to build dungeons, for your honest fellow-men—that is blasphemy. To pollute the souls of children with the dogma of eternal pain—that is blasphemy. To violate your conscience—that is blasphemy.

The jury that gives an unjust verdict, and the Judge who pronounces an unjust sentence, are blasphemers. The man who bows to public opinion against his better judgment and against his honest conviction, is a blasphemer.

Why should we fear our fellow-men? Why should not each human being have the right, so far as thought and its expression are concerned, of all the world? What harm can come from an honest interchange of thought?

I have been giving you my real ideas. I have spoken freely, and yet the sun rose this morning, just the same as it always has. There is no particular change visible in the world, and I do not see but that we are all as happy to-day as though we had spent yesterday in making somebody else miserable. I denounced on yesterday the superstitions of the Christian world, and yet, last night I slept the sleep of peace. You will pardon me for saying again that I feel the greatest possible interest in the result of this trial, in the principle at stake. This is my only apology, my only excuse for taking your time. For years I have felt that the

great battle for human liberty, the battle that has covered thousands of fields with heroic dead, had finally been won. When I read the history of this world, of what has been endured, of what has been suffered, of the heroism and infinite courage of the intellectual and honest few, battling with the countless serfs and slaves of kings and priests, of tyranny, of hypocrisy, of ignorance and prejudice, of faith and fear, there was in my heart the hope that the great battle had been fought, and that the human race, in its march towards the dawn, had passed midnight, and that the "great balance weighed up morning." This hope, this feeling, gave me the greatest possible joy. When I thought of the many who had been burnt, of how often the sons of liberty had perished in ashes, of how many of the noblest and greatest had stood upon scaffolds, and of the countless hearts, the grandest that ever throbbed in human breasts, that had been broken by the tyranny of Church and State, of how many of the noble and loving had sighed themselves away in dungeons, the only consolation was that the last Bastille had fallen, that the dungeons of the Inquisition had been torn down and that the scaffolds of the world could no longer be wet with heroic blood.

You know that sometimes, after a great battle has been fought, and one of the armies has been broken, and its fortifications carried, there are occasional stragglers beyond the great field, stragglers who know nothing of the fate of their army, know nothing of the victory, and for that reason, fight on. There are a few such stragglers in the State of New Jersey. They have never heard of the great victory. They do not know that in all civilized countries the hosts of superstition have been put to flight. They do not know that freethinkers, infidels, are to-day the leaders of the intellectual armies of the world.

One of the last trials of this character, tried in Great Britain,—and that is the country that our ancestors fought in the sacred name of liberty,—one of the last trials in that country, a country ruled by a State church, ruled by a

woman who was born a queen, ruled by dukes and nobles and lords, children of ancient robbers—was in the year 1843. George Jacob Holyoake, one of the best of the human race, was imprisoned on a charge of Atheism, charged with having written a pamphlet and having made a speech in which he had denied the existence of the British God. The Judge who tried him, who passed sentence upon him, went down to his grave with a stain upon his intellect and upon his honor. All the real intelligence of Great Britain rebelled against the outrage. There was a trial after that to which I will call your attention. Judge Coleridge, father of the present Chief Justice of England, presided at this trial. A poor man by the name of Thomas Pooley, a man who dug wells for a living, wrote on the gate of a priest that, if people would burn their Bibles and scatter the ashes on the lands, the crops would be better, and that they would also save a good deal of money in tithes. He wrote several sentences of a kindred character. He was a curious man. He had an idea that the world was a living, breathing animal. He would not dig a well beyond a certain depth for fear he might inflict pain upon this animal, the earth. He was tried before Judge Coleridge, on that charge. An infinite God was about to be dethroned, because an honest well-digger had written his sentiments on the fence of a parson. He was indicted, tried, convicted and sentenced to prison. Afterwards, many intelligent people asked for his pardon, on the ground that he was in danger of becoming insane. The Judge refused to sign the petition. The pardon was refused. Long before his sentence expired, he became a raving maniac. He was removed to an asylum and there died. Some of the greatest men in England attacked that Judge, among these, Mr. Buckle, author of "The History of Civilization in England," one of the greatest books in this world. Mr. Buckle denounced Judge Coleridge. He brought him before the bar of English opinion, and there was not a man in England, whose opinion was worth anything, who did not agree with Mr. Buckle, and did not with

him, declare the conviction of Thomas Pooley to be an infamous outrage. What were the reasons given? This, among others. The law was dead; it had been asleep for many years; it was a law passed during the ignorance of the Middle Ages, and a law that came out of the dungeons of religious persecution; a law that was appealed to by bigots and by hypocrites, to punish, to imprison an honest man.

In many parts of this country people have entertained the idea that New England was still filled with the spirit of Puritanism, filled with the descendants of those who killed Quakers in the name of universal benevolence, and traded Quaker children in the Barbadoes for rum, for the purpose of establishing the fact that God is an infinite father.

Yet, the last trial in Massachusetts on a charge like this, was when Abner Kneeland was indicted on a charge of atheism.⁷ He was tried for having written this sentence: "The Universalists believe in a God which I do not." He was convicted and imprisoned. Chief Justice Shaw upheld the decision, and upheld it because he was afraid of public opinion; upheld it, although he must have known that the statute under which Kneeland was indicted, was clearly and plainly in violation of the Constitution. No man can read the decision of Justice Shaw without being convinced that he was absolutely dominated, either by bigotry, or hypocrisy. One of the Judges of that court, a noble man, wrote a dissenting opinion, and in that dissenting opinion is the argument of a civilized, of an enlightened jurist. No man can answer the dissenting opinion of Justice Morton. The case against Kneeland was tried more than fifty years ago, and there has been none since in the New England States; and this case, that we are now trying, is the first ever tried in New Jersey. The fact that it is the first, certifies to my interpretation of this statute, and it also

⁷ See 13 Am. St. Tr., p. 450.

certifies to the toleration and to the civilization of the people of this state. The statute is upon your books. You inherited it from your ignorant ancestors, and they inherited it from their savage ancestors. The people of New Jersey were heirs of the mistakes and of the atrocities of ancient England.

It is too late to enforce a law like this. Why has it been allowed to slumber? Who obtained this indictment? Were they actuated by good and noble motives? Had they the public weal at heart, or were they simply endeavoring to be revenged upon this defendant? Were they willing to disgrace the State, in order that they might punish him?

I have given you my definition of blasphemy, and now the question arises, what is worship? Who is worshipper? What is prayer? What is real religion? Let me answer these questions.

Good, honest, faithful work, is worship. The man who ploughs the fields and fells the forests; the man who works in mines, the man who battles with the winds and waves out on the wide sea, controlling the commerce of the world; these men are worshippers. The man who goes into the forest, leading his wife by the hand, who builds him a cabin, who makes a home in the wilderness, who helps to people and civilize and cultivate a continent, is a worshipper.

Labor is the only prayer that Nature answers; it is the only prayer that deserves an answer,—good, honest, noble work.

A woman whose husband has gone down to the gutter, gone down to degradation and filth; the woman who follows him and lifts him out of the mire and presses him to her noble heart, until he becomes a man once more, this woman is a worshipper. Her act is worship.

The poor man and the poor woman who work night and day, in order that they may give education to their children, so that they may have a better life than their father and mother had; the parents who deny themselves the comforts of life, that they may lay up something to help their chil-

dren to a higher place—they are worshippers; and the children who, after they reap the benefit of this worship, become ashamed of their parents, are blasphemers.

The man who sits by the bed of his invalid wife,—a wife prematurely old and gray,—the husband who sits by her bed and holds her thin, wan hand in his as lovingly, and kisses it as rapturously, as passionately, as when it was dimpled,—that is worship; that man is a worshipper; that is real religion. Whoever increases the sum of human joy, is a worshipper. He who adds to the sum of human misery, is a blasphemer.

Gentlemen, you can never make me believe—no statute can ever convince me, that there is any infinite being in this universe who hates an honest man. It is impossible to satisfy me that there is any God, or can be any God, who holds in abhorrence a soul that has the courage to express its thought. Neither can the whole world convince me that any man should be punished, either in this world or the next, for being candid with his fellow-men. If you send men to the penitentiary for speaking their thoughts, for endeavoring to enlighten their fellows, then the penitentiary will become a place of honor, and the victim will step from it—not stained, not disgraced, but clad in robes of glory.

Let us take one more step. What is holy? What is sacred? I reply that human happiness is holy, human rights are holy. The body and soul of man—these are sacred. The liberty of man is of far more importance than any book—the rights of man, more sacred than any religion—than any Scriptures, whether inspired or not. What we want is the truth, and does any one suppose that all of the truth is confined in one book—that the mysteries of the whole world are explained by one volume? All that is—all that conveys information to man—all that has been produced by the past—all that now exists—should be considered by an intelligent man. All the known truths of this world—all the philosophy, all the poems, all the pictures, all the statutes, all the entrancing music—the prattle of babes, the lullaby

of mothers, the words of honest men, the trumpet calls to duty—all these make up the Bible of the world—everything that is noble and true and free, you will find in this great book. If we wish to be true to ourselves,—if we wish to benefit our fellow men—if we wish to live honorable lives—we will give to every other human being every right that we claim for ourselves.

There is another thing that should be remembered by you. You are the judges of the law, as well as the judges of the facts. In a case like this, you are the final judges as to what the law is; and if you acquit, no court can reverse your verdict. To prevent the least misconception, let me state to you again what I claim:

First. I claim that the Constitution of New Jersey declares that: "*The liberty of speech shall not be abridged.*"

Second. That this statute, under which this indictment is found, is unconstitutional, because it does abridge the liberty of speech; it does exactly that which the Constitution emphatically says shall not be done.

Third. I claim, also, that under this law—even if it be constitutional—the words charged in this indictment do not amount to blasphemy, read even in the light, or rather in the darkness, of this statute.

Do not, I pray you, forget this point. Do not forget that, no matter what the Court may tell you about the law—how good it is, or how bad it is—no matter what the Court may instruct you on that subject—do not forget one thing, and that is: that the words charged in the indictment are the only words that you can take into consideration in this case. Remember that, no matter what else may be in the pamphlet—no matter what pictures or cartoons there may be of the gentlemen in Boonton who mobbed this man in the name of universal liberty and love—do not forget that you have no right to take one word into account except the exact words set out in this indictment—that is to say, the words that I have read to you. Upon this point the Court will instruct you that you have nothing to do with any other

line in that pamphlet; and I now claim, that should the Court instruct you that the statute is constitutional, still I insist that the words set out in this indictment do not amount to blasphemy.

There is still another point. This statute says: "whoever shall *wilfully* speak against." Now, in this case, you must find that the defendant "*wilfully*" did so and so—that is to say, that he made the statements attributed to him knowing that they were not true. If you believe that he was honest in what he said, then this statute does not touch him. Even under this statute, a man may give his honest opinion. Certainly, there is no law that charges a man with "*wilfully*" being honest—"wily" telling his real opinion—"wily" giving to his fellow-men his thought.

Where a man is charged with larceny, the indictment must set out that he took the goods or the property with the intention to steal—with what the law calls the *animus furandi*. If he took the goods with the intention to steal, then he is a thief; but if he took the goods believing them to be his own, then he is guilty of no offense. So in this case, whatever was said by the defendant must have been "*wily*" said. And I claim that if you believe that what the man said was honestly said, you cannot find him guilty under this statute.

One more point: This statute has been allowed to slumber so long, that no man had the right to awaken it. For more than one hundred years it has slept; and so far as New Jersey is concerned, it has been sound asleep since 1664. For the first time it is dug out of its grave. The breath of life is sought to be breathed into it, to the end that some people may wreak their vengeance on an honest man.

Is there any evidence—has there been any—to show that the defendant was not absolutely candid in the expression of his opinions? Is there one particle of evidence tending to show that he is not a perfectly honest and sincere man? Did the prosecution have the courage to attack his reputa-

tion? No. The State has simply proved to you that he circulated that pamphlet—that is all.

It was claimed, among other things, that the defendant circulated this pamphlet among children. There was no such evidence—not the slightest. The only evidence about schools, or school-children was, that when the defendant talked with the bill poster—whose business the defendant was interfering with—he asked him something about the population of the town, and about the schools. But according to the evidence, and as a matter of fact, not a solitary pamphlet was ever given to any child, or to any youth. According to the testimony, the defendant went into two or three stores—laid the pamphlets on a show case, or threw them upon a desk—put them upon a stand where papers were sold, and in one instance handed a pamphlet to a man. That is all.

In my judgment, however, there would have been no harm in giving this pamphlet to every citizen of your place.

Again I say, a law that has been allowed to sleep for all these years—allowed to sleep by reason of the good sense and by reason of the tolerant spirit of the state of New Jersey, should not be allowed to leap into life because a few are intolerant, or because a few lacked good sense and judgment. This snake should not be warmed into vicious life by the blood of anger.

Probably not a man on this jury agrees with me about the subject of religion. Probably not a member of this jury thinks that I am right in the opinions that I have entertained and have so often expressed. Most of you belong to some church, and I presume that those who do, have the good of what they call Christianity at heart. There may be among you some Methodists. If so, they have read the history of their church, and they know that when it was in the minority, it was persecuted, and they know that they cannot read the history of that persecution without becoming indignant. They know that the early Metho-

dists were denounced as heretics, as ranters, as ignorant pretenders.

There are also on this jury Catholics, and they know that there is a tendency in many parts of this country to persecute a man now because he is a Catholic. They also know that their church has persecuted in times past, whenever and wherever it had the power; and they know that Protestants, when in power, have always persecuted Catholics; and they know, in their hearts, that all persecution, whether in the name of law, or religion, is monstrous, savage, and fiendish.

I presume that each one of you has the good of what you call Christianity at heart. If you have, I beg of you to acquit this man. If you believe Christianity to be good, it never can do any church any good to put a man in jail for the expression of opinion. Any church that imprisons a man because he has used an argument against its creed, will simply convince the world that it cannot answer the argument.

Christianity will never reap any honor, will never reap any profit, from persecution. It is a poor, cowardly, dastardly way of answering arguments. No gentleman will do it—no civilized man ever did do it—no decent human being ever did, or ever will.

I take it for granted that you have a certain regard, a certain affection, for the state in which you live—that you take a pride in the Commonwealth of New Jersey. If you do, I beg of you to keep the record of your state clean. Allow no verdict to be recorded against the freedom of speech. At present there is not to be found on the records of any inferior Court, or on those of the Supreme tribunal—any case in which a man has been punished for speaking his sentiments. The records have not been stained—have not been polluted—with such a verdict.

Keep such a verdict from the reports of your state—from the records of your courts. No jury has yet, in the

state of New Jersey, decided that the lips of honest men are not free—that there is a manacle upon the brain.

For the sake of your state—for the sake of her reputation through the world—for your own sakes—for the sake of your children, and their children yet to be—say to the world that New Jersey shares in the spirit of this age,—that New Jersey is not a survival of the Dark Ages,—that New Jersey does not still regard the thumb-screw as an instrument of progress,—that New Jersey needs no dungeon to answer the arguments of a free man, and does not send to the penitentiary men who think, and men who speak. Say to the world that where arguments are without foundation, New Jersey has confidence enough in the brains of her people to feel that such arguments can be refuted by reason.

For the sake of your state acquit this man. For the sake of something of far more value to this world than New Jersey—for the sake of something of more importance to mankind than this continent—for the sake of human liberty, for the sake of free speech, acquit this man.

What light is to the eyes, what love is to the heart, liberty is to the soul of man. Without it, there come suffocation, degradation and death.

In the name of liberty, I implore—and not only so, but I insist—that you shall find a verdict in favor of this defendant. Do not do the slightest thing to stay the march of human progress. Do not carry us back, even for a moment, to the darkness of that cruel night that good men hoped had passed away forever. Liberty is the condition of progress. Without liberty, there remains only barbarism. Without liberty, there can be no civilization. If another man has not the right to think, you have not even the right to think that he thinks wrong. If every man has not the right to think, the people of New Jersey had no right to make a statute, or to adopt a Constitution—no jury has the right to render a verdict, and no court to pass its sentence. In other words, without liberty of thought, no human

being has the right to form a judgment. It is impossible that there should be such a thing as real religion, without liberty. Without liberty there can be no such thing as conscience, no such word as justice. All human actions—all good, all bad—have for a foundation the idea of human liberty, and without liberty there can be no vice, and there can be no virtue. Without liberty there can be no worship, no blasphemy—no love, no hatred, no justice, no progress. Take the word liberty from human speech and all the other words become poor, withered, meaningless sounds—but with that word realized—with that word understood, the world becomes a paradise.

Understand me. I am not blaming the people. I am not blaming the prosecution, nor the prosecuting attorney. The officers of the Court are simply doing what they feel to be their duty. They did not find the indictment. That was found by the grand jury. The grand jury did not find the indictment of its own motion. Certain people came before the grand jury and made their complaint—gave their testimony, and upon that testimony, under this statute, the indictment was found.

While I do not blame these people—they not being on trial—I do ask you to stand on the side of right.

I cannot conceive of much greater happiness than to discharge a public duty, than to be absolutely true to conscience, true to judgment, no matter what authority may say, no matter what public opinion may demand. A man who stands by the right against the world cannot help applauding himself, and saying: "I am an honest man."

I want your verdict—a verdict born of manhood, of courage; and I want to send a dispatch to-day to a woman who is lying sick. I wish you to furnish the words of this dispatch—only two words—and these two words will fill an anxious heart with joy. They will fill a soul with light. It is a very short message—only two words—and I ask you to furnish them: "Not guilty."

You are expected to do this because I believe you will

be true to your consciences, true to your best judgment, true to the best interests of the people of New Jersey, true to the great cause of liberty.

I sincerely hope that it will never be necessary again, under the flag of the United States—that flag for which has been shed the bravest and best blood of the world—under that flag maintained by Washington, by Jefferson, by Franklin and by Lincoln—under that flag in defense of which New Jersey poured out her best and bravest blood—I hope it will never be necessary again for a man to stand before a jury and plead for the liberty of speech.

May 20.

Mr. Cutler summed up the case for the State very briefly. He asked the jury to determine whether or not the statute had been violated, and if they found such violation to convict. He alluded to the refusal of the defense to put the defendant on the witness stand.

THE CHARGE AND VERDICT.

JUDGE CHILDS: The defendant Charles B. Reynolds, has been tried before you on indictment charging him with blasphemy. We have nothing to do with the wisdom of the Grand Jury, the motive for that body's action, or the motive of the persons who made the accusation. The question is, has the statute been violated, and if so, is Reynolds the person who violated it? The presumption is in favor of his innocence, and he should be so considered until proven otherwise beyond a reasonable doubt. It need not be shown that he is guilty beyond all doubt to justify you in finding a conviction, as nothing human can be proved beyond all doubt. Heresy and unconformity with the laws does not alone comprise blasphemy, as any utterance calculated to offend a Christian community can be so construed. The law is not obsolete, as *Mr. Ingersoll* would have you believe, for although it had its origin in Colonial Times, the Legislature of this State in 1874 decided that it was good law,

and endorsed the utterance of the statute. Reynolds was indicted for writing and circulating documents containing utterances which the law says constituted blasphemous libel, in as much as they deride and contumeliously reproach the holy word of Jesus Christ. What though Mr. Ingersoll defended freedom of speech by words so beautiful and fine of sentiment as to send a thrill through the veins of his hearers, he has not offset evidence by evidence. The law, I instruct you, is constitutional.

It is your duty, gentlemen of the jury, to convict or acquit this defendant and I desire it understood that you must do one or the other, and I want you to see that you yourselves do not violate the law by acquitting him.

The *jury* retired soon after 11 and returned a verdict of guilty a few minutes after 12.

THE COURT reconvened at 2 and *Reynolds* was sentenced to a fine of \$25 and the costs of the Prosecution amounting to \$100 which he immediately paid and left the court room.

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